

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653 (KRH)  
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.  
CIRCUIT CITY STORES . 701 East Broad Street  
INC., . Richmond, VA 23219  
.  
.  
Debtor. . August 27, 2009  
. . . . . 11:08 a.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY COURT JUDGE

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I N D E X

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WITNESSES

NONE

EXHIBITS

ID.

EVD.

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1 THE CLERK: Please be seated and come to order. In  
2 the matter of Circuit City Stores, Incorporated, hearing on  
3 items one through 60, as set out on debtors' agenda.

4 MR. FOLEY: Good morning, Your Honor. Doug Foley, of  
5 McGuireWoods, on behalf of the debtors.

6 THE COURT: Good morning, Mr. Foley.

7 MR. FOLEY: With me today from my firm is Sarah  
8 Boehm, recently back from maternity leave.

9 THE COURT: Wonderful.

10 MR. FOLEY: As well as Gregg Galardi and Ian  
11 Fredericks, from Skadden Arps. Your Honor, here today from the  
12 company is Jim Marcum, CEO, as well as Michelle Mosier, the  
13 principle financial officer. Deborah Miller is assistant  
14 general counsel.

15 We also have some professionals that you may hear  
16 some proffers from today: Jim Avallone from DJM Asset  
17 Management, and Gabe Fried from Streambank, dealing with the  
18 miscellaneous intellectual property asset sale motion, Your  
19 Honor.

20 THE COURT: All right. Very good.

21 MR. FOLEY: Your Honor, the matters on the agenda, a  
22 lot of them have been resolved or we're requesting to be  
23 adjourned. There are a few matters that we do need to -- the  
24 Court to address today. But just going through the order on  
25 the agenda, Your Honor, the first six items have been resolved.

1 Items numbers one, two, three and four, these are  
2 administrative claim request motions by Bond Circuit, Roman  
3 numeral IV, Delaware Business Trust, Myrtle Beach Farms  
4 Company, Market Heights and Team Retail Westbank, those have  
5 all resolved and can be removed from the docket.

6 THE COURT: Very good.

7 MR. FOLEY: Your Honor, item number five is a motion  
8 by the United States for approval of recoupment, and we have  
9 submitted a -- actually, an order that's actually already been  
10 entered at Docket No. 4402.

11 THE COURT: Okay.

12 MR. FOLEY: So that can be removed from the docket.

13 THE COURT: All right.

14 MR. FOLEY: Your Honor, item number six, this is a  
15 motion for relief from stay by Premier Contracting. Mr. Gray  
16 is here. We have submitted an order, consent order on that.  
17 So that should be pending in your chambers.

18 THE COURT: You wish to be heard, Mr. Gray?

19 MR. GRAY: Thank you, Your Honor. Just quickly for  
20 the record, William Gray, for Premier Contracting, and we have  
21 reached an agreement and submitted the order.

22 THE COURT: All right. Thank you, sir.

23 MR. GRAY: Thank you.

24 MR. FOLEY: Your Honor, items number seven and eight,  
25 these are requests for payment of 503(b)(9) claims by Motorola

1 and General Instrument. They have agreed to adjourn their  
2 motions until the October 15th omnibus hearing date that Your  
3 Honor recently has given to us at 2:00 p.m.

4 THE COURT: All right. Very good.

5 MR. FOLEY: Your Honor, item number nine, if we could  
6 drop that down on the docket, Mr. Fredericks will deal with  
7 that with respect to the matters that he's addressing, and  
8 explain what we expect and hope to have on the September 16th  
9 hearing date with respect to that matter at 1:00 p.m.

10 THE COURT: Okay.

11 MR. FOLEY: Your Honor, items number 10 is the  
12 DIRECTV motion for relief from the automatic stay to exercise  
13 setoff rights. They have agreed as part of our continuing  
14 reconciliation process with them, to adjourn their motion till  
15 the October 15th omnibus hearing date at 2:00 p.m.

16 THE COURT: All right.

17 MR. FOLEY: Your Honor, similarly, Sony Pictures Home  
18 Entertainment's request for 503(b)(9) claim, we are continuing  
19 to reconcile their claim and trying to resolve it. They have  
20 agreed to adjourn their motion until the October 15th hearing  
21 date, as well.

22 THE COURT: All right.

23 MR. FOLEY: Your Honor, item number 12, this is the  
24 motion by Vertis for approval to -- for permission to file a  
25 late proof of claim. They have agreed only to adjourn their



1 motion until the September 22nd hearing date.

2 THE COURT: All right.

3 MR. FOLEY: Your Honor, the next item on -- item  
4 number 13, this is the Sennheisser Electric Corporation motion  
5 to -- for permission to file a late 503(b)(9) claim. We have  
6 spoken with them and several of the other claimants that are  
7 similarly situated, and they have agreed to actually adjourn  
8 their motion until what we believe will be the confirmation  
9 hearing in this case, November 23rd, Your Honor, so that we  
10 don't have to deal with any issues prematurely with respect to  
11 these issues.

12 THE COURT: All right.

13 MR. FOLEY: Item number 14, Your Honor, SouthPeak,  
14 their motion for an administrative expense claim, they've also  
15 agreed to adjourn until the October 15th hearing date. Item  
16 number 15, Your Honor, Newport News, this is their motion for  
17 payment of a tax claim. We believe we have resolved it. They  
18 have agreed to adjourn the matter until the October 15th  
19 hearing date.

20 THE COURT: All right.

21 MR. FOLEY: Item number 16, this is the motion by  
22 Site A, LLC. They have also agreed to adjourn their motion  
23 until the October 15th hearing date. Item number 17, Your  
24 Honor, Towne Square, this is, again, a motion for filing a --  
25 permission to file a late claim. They've agreed to adjourn

1 their motion until October 15th.

2 Your Honor, item number 18, this is Schimenti  
3 Construction's motion for a 2004 examination. We have been  
4 working with them informally and providing documentation to  
5 them with respect to the construction of the two stores that  
6 they were involved in.

7 We've actually produced electronically a substantial  
8 amount of documentation that they need time to review. So they  
9 have agreed to adjourn their motion for a 2004 until October  
10 15th, Your Honor. Item number 19, this is the motion by Slam  
11 Brands, for a request for payment of administrative claim.

12 They have agreed to adjourn their motion until  
13 October 15th at 2:00 p.m. Similarly, Your Honor, item number  
14 20, this is the AmREIT's motion for an administrative expense  
15 claim that they've agreed to adjourn until October 15th. Item  
16 number 21, Your Honor, this is Waste Management's motion for a  
17 late -- permission to file a late proof of claim. They have so  
18 far only agreed to adjourn until September 22nd hearing date,  
19 Your Honor.

20 Item number 22, this is the motion by Columbus  
21 Dispatch for a payment of administrative claim. They have  
22 agreed to adjourn till the October 15th hearing date. Item  
23 number 23, Your Honor, this is the debtors' motion under 365 to  
24 reject a domain name licensing agreement effective as of August  
25 12th, and setting aside a right of first refusal.

1 This is related to the matters on the docket today  
2 under item number 25 on miscellaneous intellectual property  
3 assets. They have agreed to withdraw the objection to that.  
4 Pending on what happens with respect to the sale, this motion  
5 may be moot, but they have agreed to adjourn it until the  
6 September 22nd hearing date.

7 THE COURT: All right.

8 MR. FOLEY: Your Honor, one additional item that is  
9 currently shown on the docket as going forward today is item  
10 number 31. This is our lease disposition procedures motion.  
11 There was one remaining, unresolved objection by 444  
12 Connecticut Avenue.

13 They have agreed, Your Honor, to adjourn -- to  
14 adjourn that issue until September 22nd. So item number 31,  
15 Your Honor, can be moved to the adjourned matters.

16 THE COURT: And that's -- when did you say we're  
17 going to hear that?

18 MR. FOLEY: September 22nd.

19 THE COURT: All right.

20 MR. FOLEY: Your Honor, before I turn the podium over  
21 temporarily to Mr. Fredericks to deal with items 24, 25, 26,  
22 27, 28 and 33, there is a matter that's on, a procedure matter,  
23 item number 29. This is our motion, Your Honor, with respect  
24 to scheduling the disclosure statement hearing on the joint  
25 plan proposed by both the debtors and the committee of

1 liquidation and having the disclosure statement hearing heard  
2 on September 22nd.

3           We appreciate Your Honor granting an expedited  
4 hearing request to have the motion heard today, which is item  
5 number 30, which is now moot. But under item number 29, Your  
6 Honor, with respect to the time periods for which people would  
7 have notice of the objection deadline to the disclosure  
8 statement, as well as of the hearing date, the combination of  
9 Rule 2002 and Local Bankruptcy Rule 3016-1(b), we wanted to  
10 make it absolutely clear that what we were trying to do was get  
11 people more time to object to the disclosure statement, rather  
12 than less, and we noticed it without seeking permission to  
13 alter the local rule.

14           The pending motion simply asks that the Court allow  
15 objections to the disclosure statement be filed three business  
16 days prior to the disclosure statement hearing, rather than  
17 five, which is what the local rule says. And so we would ask  
18 the Court to grant that.

19           Mr. Galardi has promised me that we will resolve  
20 every single disclosure statement objection prior to the  
21 hearing, so you won't have to read anything, anyway. So --

22           THE COURT: Well, with that representation the motion  
23 will be granted.

24           (Laughter)

25           MR. FOLEY: Thank you, Your Honor. Mr. Fredericks

1 will address items 24 through 28 and 33.

2 MR. FREDERICKS: Good morning, Your Honor. Ian  
3 Fredericks, with Skadden, Arps, Slate, Meagher and Flom, on  
4 behalf of the debtors. Before I get to the uncontested  
5 matters, I just wanted to go back to matter number nine, which  
6 is the federal warranty motion related to the debtors' warranty  
7 programs.

8 THE COURT: Right.

9 MR. FREDERICKS: First, I appreciate Your Honor  
10 giving us the September 16th hearing date for a -- to approve  
11 settlements we've been working on with these -- with all of our  
12 warranty providers. What we've done is because the issues with  
13 our warranty providers have all -- all overlap considerably,  
14 and in addition, there is a third party General Electric, who  
15 used to be a warranty provider, who also may or may not have  
16 certain rights, we've worked out three separate settlement  
17 agreements, and then certain of those parties have also worked  
18 out interim agreements between themselves.

19 We have reached final documentation on all of the  
20 settlements that we are currently exchanging signature pages.  
21 The problem is, certain principals of some of the nondebtors  
22 are traveling and we just haven't received those signature  
23 pages. We were hopeful to be able to file a motion to approve  
24 all of those settlements today so it would be heard on regular  
25 notice for the 16th.

1           It's unlikely we will receive all the signature pages  
2 until tomorrow, and some of the parties want to review the  
3 motion prior to it being filed. So it's possible it gets filed  
4 tomorrow or it may slip till Monday. Just wanted to give the  
5 Court that -- those pieces of information.

6           Also, we have kept the committee apprised of these  
7 since early on in the negotiations. I believe they're fully --  
8 they've seen substantially final forms of the agreements. So  
9 they are in the loop, as well.

10           THE COURT: All right. Very good.

11           MR. FREDERICKS: Okay. Turning to matter number 24,  
12 what I'd propose to do if it's acceptable to Your Honor is,  
13 there are four motions seeking to sell individual parcels of  
14 real estate. They're matter 24, 26, 27 and 33. Three of them  
15 were listed on the agenda as uncontested. That was 24, 26 and  
16 27.

17           Thirty-three had a limited objection from the tenant  
18 at the property. We have resolved that objection with changes  
19 to the order, which I can go through. But if it's acceptable  
20 to Your Honor, I'd go through all four of those motions  
21 together in successive order.

22           THE COURT: I think that makes good sense.

23           MR. FREDERICKS: Okay. In addition -- thank you,  
24 Your Honor. In addition to that, I'd propose to use one kind  
25 of general proffer for all four motions, and then as I get to

1 each motion address any specific issues, if that's acceptable  
2 to Your Honor, as well.

3 THE COURT: That's acceptable, as well.

4 MR. FREDERICKS: Okay. The four motions are the  
5 motion to sell the Moreno Valley, California, property. The  
6 Virgil Place property, located in Los Angeles, California, the  
7 debtors' property in San Jose, California, as well as the  
8 debtors' property in Lithia Springs, Georgia.

9 The two witnesses that I would propose to proffer are  
10 Mr. Jim Marcum, the chief executive officer of the debtors, as  
11 well as Mr. Jim Avallone, a principal with DJM Realty, the  
12 debtors' real estate advisors. Both persons are present in the  
13 courtroom and available to testify.

14 If called as a witness -- as witnesses, Mr. Avallone  
15 would testify that the DJM marketed these -- marketed these  
16 assets since the debtors announced their liquidation. In  
17 addition, they marketed the assets in accordance with the  
18 procedures set forth in the motion.

19 The bid procedures were similar to bid procedures  
20 approved by this Court previously, and the debtor and Mr.  
21 Avallone and Mr. Marcum believe those procedures are fair and  
22 reasonable. In each case, the debtors negotiated a stalking  
23 horse agreement with the bidder that they believed at the time  
24 presented the highest or otherwise best proposal to -- to begin  
25 the auction process.

1           The debtors and each purchaser negotiated -- the  
2 debtors and each of the stalking horse bidders, as well as in  
3 some instances the successful bidder, negotiated at arm's-  
4 length and in good faith. There was no collusion among the  
5 bidders.

6           Each of the ultimate purchasers, as well as the  
7 stalking horse bidders, were not insiders of the debtors. The  
8 consideration ultimately presented by each of the purchasers is  
9 the highest or otherwise best consideration received by the  
10 debtors after consultation with the creditors' committee.

11           The purchasers -- each of the purchasers would not  
12 have entered into the transactions with the debtors had the  
13 assets not been sold free and clear of any interests, with the  
14 exception of the permitted encumbrances, as defined in each  
15 agreement.

16           The debtors have determined they have no further use  
17 for the property and, thus, propose to sell it. The debtors  
18 also believe that each of the sales is in the best interests of  
19 their estates and creditors and should be approved. With  
20 respect to three of the transactions, all the transactions  
21 except the Virgil Place property located in Los Angeles, at the  
22 time the debtors entered into the stalking horse agreements  
23 they had negotiated expense reimbursements with each of the  
24 purchasers.

25           Those expense reimbursements ranged from 25,000 to



1 37,500. Mr. Marcum would testify that -- as well as Mr.  
2 Avallone -- that absent the debtor agreeing to those expense  
3 reimbursements, those bidders would not have placed the initial  
4 bids they placed that were subject to higher or better offers.

5 With that, that would close the general proffer and I  
6 will, with Your Honor's -- with Your Honor's agreement I would  
7 proceed with matter number 24, the sale of the Moreno Valley  
8 property.

9 THE COURT: You may.

10 MR. FREDERICKS: Okay. With respect to this  
11 property, the debtors received only one bid. That was the  
12 stalking horse bidder, 99¢ Only Stores. The purchase price in  
13 the agreement was \$2,250,000. There was no auction, as there  
14 was no other -- there were no other bids received.

15 In addition, there was an expense reimbursement  
16 agreed to here of actual out-of-pocket expenses of up to  
17 \$35,000. This expense reimbursement would only have been  
18 payable in the event the purchaser was not in default and the  
19 debtors closed the transaction with a higher or otherwise  
20 better bidder.

21 With respect to the San Jose -- or excuse me -- with  
22 respect to the Virgil Place property, which is matter number  
23 26, there were ultimately four bids received, one of which was  
24 the stalking horse bidder. Unfortunately, only three of the  
25 bidders elected to proceed with the auction.

1           The stalking horse bidder advised the debtors prior  
2 to the sale of the auction that they would not be  
3 participating. There was no expense reimbursement with respect  
4 to this property. At the auction the -- ultimately -- sorry.  
5 The auction began at \$350,000. Ultimately, the sale price was  
6 \$585,000.

7           The successful bidder was Children's Hospital of Los  
8 Angeles, and the next highest bidder was Evergreen Realty, at  
9 \$580,000. The next property in order is the Lithia Springs --  
10 the Lithia Springs, Georgia, property. There were two bids.  
11 One of them was the stalking horse bidder.

12           The second -- that was Axiom Holdings. The second  
13 bidder was All American Containers. The -- ultimately, the --  
14 the highest or otherwise best bid at the auction was \$2,200,000  
15 by Axiom Holdings, and the next highest or otherwise best bid  
16 was \$2,175,000 by All American Containers.

17           With respect to the San Jose property there were two  
18 bids. And that's matter number 33, Your Honor. There were two  
19 bids. One was the stalking horse bidder and one was the -- a  
20 company by the name of Smythe European, Inc. The purchase  
21 price I believe started at \$8,250,000.

22           There was a \$37,500 expense reimbursement in that  
23 agreement. At the conclusion of the auction the highest or  
24 otherwise best bid was \$11,150,000, which was submitted by  
25 Smythe European, Inc., and the next highest or otherwise best

1 bid was I believe \$11,100,000, presented by the stalking horse  
2 bidder.

3 THE COURT: And there is a expense reimbursement,  
4 then, going back to the stalking horse bidder?

5 MR. FREDERICKS: Yes. Upon submission of the actual  
6 -- or the actual out-of-pocket expenses or reasonable out-of-  
7 pocket expenses, yes, there would be an expense reimbursement  
8 going back to the -- that bidder. The -- at each of the  
9 auctions the debtor had a court reporter present.

10 I have here copies of the transcripts of each of the  
11 auctions, which I'd post -- well, I guess that would close the  
12 debtors' proffer of Mr. Marcum and Mr. Avallone.

13 THE COURT: All right. Does any party wish to  
14 examine the proffered witnesses? All right. The proffer's  
15 accepted.

16 MR. FREDERICKS: Thank you, Your Honor. In addition  
17 to that, Your Honor, the debtors, as I mentioned, had a court  
18 reporter present at each auction. The court reporter -- I have  
19 here transcripts of each of the auctions, which I'd propose to  
20 move into evidence as Exhibits 1 through 3.

21 THE COURT: All right.

22 MR. FREDERICKS: Thank you. For clarity purposes,  
23 Exhibit 1 is the san -- the auction for the San Jose property.  
24 Exhibit 2 is the transcript for the Virgil Place property in  
25 Los Angeles, and Exhibit 3 is the auction transcript for the

1 Lithia Springs, Georgia, property. As there was no auction for  
2 Merino Valley, there's no transcript.

3           There are a few additional items that I would like to  
4 go over with respect to these sales, Your Honor. First, with  
5 respect to the sale of the Virgil Place property, there is a  
6 disclosure that was put on the record at the auction with  
7 respect to Skadden Arps, as well as a disclosure I'd like to  
8 make in the courtroom today.

9           Skadden Arps does represent the Children's Hospital  
10 of Los Angeles in matters unrelated to this. We provided no  
11 advice or representation with respect to Children's Hospital in  
12 this matter, however. Additionally, as I mentioned, there was  
13 one limited objection filed by Golfsmith, the tenant at the San  
14 Jose property.

15           I'm happy to report this objection has been resolved.  
16 The debtors have agreed to cure the outstanding defaults, which  
17 amount to -- there's a \$150 of trash removal -- well, let's  
18 take a step back for a second. Since the debtors shut down the  
19 store, third parties have in many instances decided to use the  
20 debtors' premises as a place to dump various large amounts of  
21 garbage.

22           In addition to that, landscaping has not been  
23 maintained as well as the debtors would have liked, and  
24 there -- the parking lot lights have also malfunctioned. So  
25 we've -- for those three matters the debtor have agreed to

1 reimburse Golfsmith for one -- already the actual out-of-pocket  
2 expenses they incurred with respect to the trash removal.

3           Going forward through the closing, any additional  
4 trash, Golfsmith's going to arrange for its removal and the  
5 debtors' going to agree to reimburse them for that, as well, as  
6 long as those costs are reasonable. With respect to the  
7 parking lot lights the debtors are also going to -- Golfsmith  
8 is going to locate somebody to fix the lights, provide an  
9 estimate of which the debtors can approve, and then those --  
10 the debtors will also agree to pay those expenses.

11           Finally, the -- similarly, the landscaping will be  
12 maintained by Golfsmith and the debtors will have an  
13 opportunity to review those costs before they're incurred, and  
14 likewise, pay those. In addition to that, the parking lot  
15 needs certain repairs.

16           The debtors have -- the debtors don't believe there's  
17 a default under the lease and I don't believe that Goldsmith  
18 has asserted there's a default. However, Golfsmith requested  
19 language in the order to be certain that their rights to seek  
20 from the new buyer repairs of the parking lot in accordance  
21 with the leases isn't disturbed by the order. So we've added  
22 language there, as well.

23           The last matter is at the time the auction started  
24 the debtors were under the assumption that a prime lease, which  
25 was originally in place between the debtors and the landlord

1 before the debtors purchased the property, was no longer in  
2 effect. There is some discrepancy as to whether or not that's  
3 the case.

4 So in addition to assuming and assigning the  
5 sublease, the debtors and the purchaser have agreed to assume  
6 and assign the prime lease. So that is also an additional  
7 change to the order. With that, I believe that would be  
8 everything with respect to those sales and the debtors would  
9 request that each of them be approved.

10 THE COURT: All right. Thank you. Does any party  
11 wish to be heard in connection with any of these four items?

12 MS. BEANE: Your Honor, my name is Ashley Beane. I'm  
13 from Akin, Gump, Strauss, Hauer and Feld, on behalf of  
14 Golfsmith, the tenant under this lease, and we would just like  
15 to say that we have agreed to all the terms in the order and  
16 what Mr. Fredericks just mentioned is all consistent with our  
17 agreement.

18 THE COURT: All right. Thank you, Ms. Beane.

19 MS. BEANE: Thank you.

20 THE COURT: Does any other party wish to be heard in  
21 connection with any of these four matters?

22 MR. HARBOUR: I would.

23 THE COURT: Yes, sir.

24 MR. HARBOUR: Good morning, Your Honor. For the  
25 record, Jason Harbour, of Hunton and Williams. We represent

1 Lowe's with respect to matter number 24, the Moreno sale.  
2 We've agreed to our objection. We've resolved the objection,  
3 but I just wanted to make it clear to the Court that counsel  
4 will be submitting a copy of that order to us before they  
5 submit it to chambers, just so we can confirm the order does in  
6 fact resolve the objection the way we've previously discussed.

7 THE COURT: Very good. Thank you, sir.

8 MR. HARBOUR: And Your Honor, if I may, may I be  
9 excused?

10 THE COURT: You may be excused.

11 MR. HARBOUR: Thank you, Your Honor.

12 MR. FREDERICKS: That's correct, Your Honor. I  
13 apologize for not addressing that earlier.

14 THE COURT: All right. Does any other party wish to  
15 be heard in connection with any of these four matters? All  
16 right. We'll -- with that clarification with regard to item  
17 number 24, the Court will approve the sales and ask if you'd  
18 please submit an order to that effect.

19 MR. FREDERICKS: Thank you, Your Honor. I believe  
20 the next matter on your agenda is matter number 25. This is  
21 the debtor sale of the remaining and miscellaneous intellectual  
22 property. Present in the courtroom today are, as I mentioned  
23 before, Mr. Marcum, as well as Mr. Fried, who is a principal  
24 with Streambank, the debtors' intellectual property advisor.  
25 I'd propose to proceed by proffer with respect to this matter,

1 as well.

2 THE COURT: You may proceed.

3 MR. FREDERICKS: Okay. If called to testify, Mr.  
4 Fried would testify that Streambank marketed the assets since  
5 the -- since the sale of the debtors' primary intellectual  
6 property. They marketed the assets in accordance with the bid  
7 procedures approved by this Court in July.

8 The debtors are -- Mr. Marcum and Mr. Fried would  
9 also testify that they received approximately 14 bids for the  
10 various assets subject to the motion. Ultimately, these bids  
11 fell into four categories. It was the Firedog intellectual  
12 property, the 800.com web address, the Alpine Data, which as  
13 Your Honor may recall, was sold once to Systematics in  
14 connection with the earlier intellectual property sale.

15 And this data is the -- it contains personally  
16 identifiable consumer information from various years the  
17 debtors conducted business. The last asset is a trading  
18 circuit .com web address, as well as related customer  
19 information and related intellectual property.

20 Ultimately at the conclusion of the auction the  
21 highest or otherwise best bidder for the Firedog intellectual  
22 property was a company by the name of F1RSTMARK, and that bid  
23 was for \$250,000 and included approximately 2 million of the  
24 Firedog customers who were contained in the Alpine Data, as  
25 well as the Firedog intellectual property.



1           At the conclusion of the auction with respect to the  
2 Alpine Data, the highest or otherwise best bidder was Micro  
3 Electronics, Inc. They have agreed to purchase the Alpine Data  
4 on an exclusive basis, other than the prior sale to Systemax,  
5 but with this sale the debtors would no longer be marketing or  
6 selling the Alpine Data. They also carved out the 2 million  
7 names that were the subject of the Firedog sale.

8           Lastly, the debtors received the highest or otherwise  
9 best bid received for the Trading Circuit assets was also Micro  
10 Electronics. I believe it was in the amount of \$41,000, and  
11 following -- let's see. With respect to each purchaser, the --  
12 Mr. Marcum would testify, as well as Mr. Fried, that the  
13 debtors and each purchaser negotiated in good faith, at arm's-  
14 length and without collusion.

15           None of the purchasers are insiders. The  
16 consideration provided by each purchasers is the highest or  
17 otherwise best bid. At the conclusion of the auction the  
18 debtors have no further use for the assets and the sale of the  
19 assets is in the best interests of the debtors' estates and  
20 their creditors. With that, that would conclude the proffer  
21 for both Mr. Marcum and Mr. Fried.

22           THE COURT: Well, who's buying the domain name,  
23 800.com?

24           MR. FREDERICKS: My apologies. That's a gentleman by  
25 the name of Mr. Steven Ivester. It's an individual.

1 THE COURT: All right. Does any party wish to  
2 examine the proffered witnesses? All right. The proffer is  
3 accepted.

4 MR. FREDERICKS: Thank you, Your Honor. Following  
5 the initial property auction both the -- both FIRSTMARK and  
6 Micro Electronics worked with the CPO and other interested  
7 parties concerning protection of personal, identifiable  
8 information.

9 I'm happy to report that they have I believe -- both  
10 parties have satisfied the CPO's concerns and what we are going  
11 to do is attach as an exhibit to each order some privacy -- or  
12 some language that the CPO and each party has agreed to with  
13 respect to handling customer data.

14 In addition to that, I believe there is -- there's  
15 one party in court today who I believe would like to address  
16 the Court with respect to the 800.com asset, but other -- so  
17 I'll set that one aside for a second, but otherwise, the  
18 debtors would request that the Court approve the sale of the  
19 Firedog intellectual property, the sale of the Alpine Data and  
20 the sale of the Trading Circuit data.

21 THE COURT: All right. Does any party wish to be  
22 heard in connection with the Firedog, the Alpine Data or the  
23 Trading Circuit? Yes, ma'am.

24 MS. LEVIN: For the record, my name's Whitney Levin  
25 and I'm --

1 MS. THOMPSON: Your Honor, this is Lucy Thompson on  
2 the phone --

3 THE COURT: Excuse me. What -- on the phone, if you  
4 -- we have a party in the courtroom first.

5 MS. THOMPSON: Thank you.

6 THE COURT: And then we'll address those on the  
7 phone.

8 MS. THOMPSON: Thank you.

9 MS. LEVIN: For the record, my name is Whitney Levin  
10 and I'm from Wharton, Aldhizer and Weaver, and I represent  
11 Micro Electronics, and I just represent that we have reviewed  
12 the order and we are in agreement with it.

13 THE COURT: All right. Thank you.

14 MS. LEVIN: Thank you.

15 THE COURT: Does any other party in the courtroom  
16 wish to be heard? All right. Now, I'm going to turn to the  
17 folks that are on the phone. Does any party on the phone wish  
18 to be heard?

19 MS. THOMPSON: This is Lucy Thompson. I'm the  
20 consumer privacy ombudsman. Your Honor, I worked with the  
21 debtors, the purchasers and a representative of the National  
22 Association of Attorneys General on analyzing the requirements  
23 of the Bankruptcy Code for this sale, and we were working late  
24 into the night.

25 So I filed my report this morning for Your Honor's

1 consideration. There's certain findings that Your Honor needs  
2 to make and the analytical framework for those is on page 8 of  
3 my report. The recommendations are set forth on page 20 and  
4 21, and I would just like to say in a few sentences that I  
5 recommend that Your Honor find that F1RSTMARK is a qualified  
6 buyer.

7           And I would like to say that the agreements that  
8 we've been able to reach with both companies are very helpful  
9 to the consumers. They've worked very hard on trying to make  
10 sure that the protections are in place, and those are the  
11 documents that will be attached to the final sale order.

12           The F1RSTMARK sale is fairly straightforward.  
13 They're buying data, the Firedog data that has the consumer --  
14 or the Circuit City privacy policy applied. They've agreed to  
15 comply with the policy. It prohibits the sale or lease of  
16 consumer data to third parties for marketing purposes, and  
17 F1RSTMARK will agree to that provision.

18           With records to Micro Center, they are buying the  
19 Alpine Data, which is consumer data collected and restored.  
20 There was no privacy policy that applied to that data, but the  
21 Micro Center representatives have agreed to extend privacy  
22 protections to the 33 million Circuit City customers that are  
23 in that database.

24           And they are planning on apply the Micro Center  
25 privacy policy to those consumers, and they've done all this on

1 a voluntary basis. They also plan to rent the list to certain  
2 select marketing partners, and they've agreed to come up with a  
3 opt out and notice process so that those customers will be  
4 notified that they can opt out of having their information  
5 rented.

6 And if an individual so chooses, Micro Center will  
7 remove the name of anybody who opts out from their rental list.  
8 So those are the protections that we were able to craft for  
9 Your Honor's consideration, and under the circumstances it  
10 seems a reasonable balance between the circumstances of the  
11 bankruptcy sale and the needs of the consumers. And I'm happy  
12 to answer any questions, if Your Honor has any.

13 THE COURT: All right. Thank you very much for that  
14 report, Ms. Thompson. Does any other party wish to be heard in  
15 connection with these three matters?

16 MR. FREDERICKS: Your Honor, there are -- and this is  
17 Ian Fredericks, for the record, of the debtors again. Before I  
18 guess we close the record on those I'd like to move into  
19 evidence the transcript from the intellectual property auction,  
20 as well.

21 THE COURT: All right. It'll be received as your  
22 Exhibit No. 4.

23 MR. FREDERICKS: Thank you, Your Honor. And I also  
24 believe that Mr. Galardi -- yeah -- with respect to the 800.com  
25 asset, we want to keep the record partially open for that.

1 There are some -- possibly some additional testimony that Mr.  
2 Galardi would want to proffer, as well.

3 THE COURT: All right. So with -- does any party  
4 with to be heard -- any other party wish to be heard in  
5 connection with the fire sale -- the Firedog, the Alpine Data  
6 or Trading Circuit? All right. Those sales will be approved.

7 MR. FREDERICKS: Thank you, Your Honor. Mr. Galardi,  
8 I believe, wants to address the Court, as well. Thank you.

9 MR. GALARDI: Thank you, Your Honor. Just briefly,  
10 Your Honor, the reason we're doing it a little bit disjointed  
11 is the only outstanding concern is with respect to the 800.com.  
12 So I thought I would set the stage for that and provide some  
13 more specific testimony with respect to Mr. Fried and Mr.  
14 Marcum on that topic, which Your Honor may find important for  
15 the ultimate objection.

16 Your Honor may recall, pursuant to the procedures  
17 that Your Honor approved, we had the right to remain and keep  
18 the auction technically open, although we conducted it probably  
19 some 10 to more days ago, up until the time that the Court  
20 actually signs the order approving the particular bid.

21 We did get to an auction in New York with respect to  
22 the 800.com. There were four bids, but the only bid that  
23 actually became a "qualified bidder," the high bid, is the one  
24 that you've already heard testimony with respect to. What I  
25 thought I'd do is supplement the record with the testimony of

1 Mr. Marcum and Mr. Fried to set up the issue that I think  
2 you're going to hear next.

3 At the auction, Your Honor, it became a concern of  
4 Mr. Ivester that in fact, why go forward with the auction at  
5 all if it should turn out that some bidder could come in within  
6 the period subsequent to I think it was last Monday, a week ago  
7 Monday and today.

8 Therefore, there was a request that we state on the  
9 record of the auction, as represented by the transcript, that  
10 we would not do that, so that the auction would in sense be  
11 closed, notwithstanding our bid procedures, which Your Honor  
12 approved, to provide certainty to make sure we would get the  
13 highest and best bid on that date.

14 If called as witnesses most -- both Mr. Marcum and  
15 Mr. Fried would testify that in fact that was a request of Mr.  
16 Ivester, that it was a request that he in fact, to go forward  
17 with the bid and to give his highest and best bid at that time  
18 in accordance with the procedures, that we would actually do  
19 that and close the auction.

20 And with respect to the record, Your Honor, you will  
21 see on the end of that transcript that Mr. Fredericks did get  
22 in -- get in fact on the transcript and say that we would not  
23 be seeking higher or other bids or entertain higher or other  
24 bids.

25 That puts us in the very awkward position today that

1 we do have a bidder has now submitted yesterday, and we took a  
2 deposit to come to the Court today, a higher bid of almost  
3 nearly double the amount that is, in fact, we are requesting  
4 the Court to approve.

5 In doing so, and mister -- I believe Mr. Pomerantz is  
6 on the record -- we -- we went out and, one, solicited the  
7 committee's position, as well as to check what we have done.  
8 Mr. Fried would testify and as the record demonstrates by the  
9 notice, we did in fact comply with Your Honor's requirements  
10 with respect to notice and notice procedures.

11 We readily admit that this particular bidder was not  
12 specifically solicited for this asset, and probably didn't,  
13 according to them, see it in certain of the public notices.  
14 That said, Your Honor, we don't believe that there was any  
15 impropriety in the process by which we solicited bidders.

16 We don't believe that there was technically any  
17 deficiency in the notice provisions with respect to that. So  
18 it is at least the debtors' position, and I believe agreed to  
19 with the committee, that Your Honor, in light of what we said  
20 on that record that we would in fact not solicit other bids and  
21 that we would stand by our word, that we would come to the  
22 Court with whatever the bid that was highest and best on that  
23 auction date, notwithstanding some 10 to 12 days between, that  
24 we would still be seeking for this Court to approve as the  
25 highest and best bid at the auction, and notwithstanding that



1 it could double the amount to 200 -- from 250 to 500,000, that  
2 we would still ask Your Honor to approve, in the absence of  
3 impropriety or failure to meet due process or notice or  
4 whatever, that we would still be asking this Court to approve  
5 the bid that we have put forth to Your Honor, the bid of Mr.  
6 Ivester.

7 I don't know if Mr. Pomerantz wants to add to that,  
8 but that -- I wanted Your Honor to have specific information  
9 with respect to that.

10 THE COURT: Thank you, Mr. Galardi. Mr. Pomerantz,  
11 do you wish to address the Court on that issue?

12 MR. POMERANTZ: Yes, briefly, Your Honor. Mr.  
13 Galardi is accurate. Mr. Galardi shared with us the  
14 information that he disclosed to the Court today, and that  
15 based on -- on notions of fairness and in light of the specific  
16 representations that were made to the bidder at the auction, we  
17 support the Court approval of the \$250,000 offer of the highest  
18 and best offer, notwithstanding the late submitted offer that  
19 was made apparently today.

20 THE COURT: All right. Thank you, sir. Does any  
21 other party in the courtroom wish to be heard?

22 MR. DILLON: Yes, sir. Good morning, Judge  
23 Huennekens. Tom Dillon, with Hirschler, Fleischer. It's a  
24 pleasure to appear before you today, and I appreciate your  
25 entertaining my comments. In fact, much of what has been

1 proffered earlier we agree with. Some of the subjective  
2 comments about fairness we might disagree with.

3 THE COURT: Do you wish to examine any of the  
4 proffered witnesses?

5 MR. DILLON: We don't, Your Honor. We believe that  
6 the proffer is correct. We're familiar with the marketing  
7 agent, Streambank, that was involved and really are not here to  
8 quibble with the -- the specifics of the noticing provisions,  
9 other than just to observe that in fact -- and I can -- I'd  
10 like to proceed by proffer, if the Court would entertain that,  
11 rather than put on my client for testimony, but certainly,  
12 that's available, depending on how the Court would like to  
13 proceed.

14 THE COURT: Your client's in the courtroom?

15 MR. DILLON: He is, Your Honor.

16 THE COURT: You may proceed by proffer, and if any  
17 party wishes to cross-examine, then I'll give them that  
18 opportunity.

19 MR. DILLON: Thank you, Your Honor. Yesterday, I was  
20 contacted by the client, which is National A-1, Inc., which is  
21 a national domain name holding company, and I was contacted by  
22 Mr. Hertigan, Gary Hertigan, who is in charge of the domain  
23 name acquisitions.

24 Mr. Hertigan has been involved with the company for  
25 three years and his primary duties with the company is to seek

1 out, purchase and/or make good use of URLs and domain names  
2 based on the Internet. In speaking with Mr. Hertigan, he first  
3 found out about the sale through a blog, which was aimed at  
4 domain name and URL owners, which was sent out on Wednesday the  
5 26th of August, 2009.

6 That article was the first notice that Mr. Hertigan  
7 or National A-1, Inc., had had of the sale or of the  
8 opportunity. In the blog that alerted Mr. Hertigan and the  
9 company to the opportunity the writer of the blog indicates  
10 that, and I'll quote, "A source tells domain name wire that  
11 most of the bidders were apparently end users, which is not  
12 surprising given that the information about the auction was not  
13 reported in domain name media."

14 And so I don't think there's any question that we  
15 have with the earlier proffers, that all the notices that this  
16 Court did approve with the Wall Street Journal, Richmond Times  
17 Dispatch and others were followed. But what -- what hadn't  
18 been done and what could have been done was to -- because a big  
19 portion of the items to be auctioned off were URLs and domain  
20 names that there could have been some additional noticing in  
21 the domain name media.

22 And there is a media now that addresses and reaches  
23 out to domain name holders. And of course, this is a new media  
24 that isn't as old as the Wall Street Journal or the Richmond  
25 Times Dispatch. And of course, the Court could probably take

1 judicial notice of the fact that people are now getting their  
2 information differently than the way our fathers might have  
3 obtained that information.

4           At any rate, I would proffer Mr. Hertigan's testimony  
5 that he would testify that there was no notice in the domain  
6 name media that he was familiar with. Moreover, the client,  
7 National A-1, Inc., hereby makes its offer of \$500,000, which  
8 is 100 percent higher than our understanding of the highest bid  
9 at the auction.

10           Neither Mr. Hertigan or I were present at the  
11 auction. I can only report what I understand, but my  
12 understanding is it was correct that there was only one outcry  
13 bid made after several bidders did qualify through submitting  
14 written bids, which is a pretty customary practice.

15           I cannot address, now could Mr. Hertigan address, the  
16 agreements that were made on the record by the debtor at the  
17 end of the auction, other than to observe that as a market  
18 basis that the domain name 800.com was grossly undersold, based  
19 on the market.

20           And so therefore, it wouldn't be surprising that  
21 someone purchasing it at such a low value would be concerned  
22 that someone would hear about it and come in, just as we have  
23 today, and make a higher offer, just because the property had  
24 been sold.

25           Very similar to a house being sold for a dollar at a

1 foreclosure auction, the person paying a dollar at that auction  
2 has got a lot more to worry about, someone coming in and  
3 stealing from him than if you pay \$100,000 for that same  
4 property. The focus of the marketing didn't in fact reach my  
5 client, for whatever reason.

6 My client did retain my firm yesterday, the same day  
7 that he found out about it, wired \$500,000 to Skadden Arps'  
8 trust account, authorizes me to submit the bid for \$500,000,  
9 and while a bit risky, agrees to sign whatever asset purchase  
10 agreement that may be in place and agrees to close today with  
11 the Court's blessing.

12 So what we have before the Court is an essentially  
13 \$250,000 more than what had been obtained during the auction  
14 process. I do agree with debtors' counsel when they observe  
15 that the bidding procedures, which were published and made part  
16 of the notice, did state that they did have the right to reopen  
17 at any time, and that that was blessed by this court.

18 And so unless the agreement not to reopen it that was  
19 made on the record at the auction was also blessed by the  
20 Court, that wouldn't be the same sort of peer agreement, that  
21 in order for them to undo what was part of the bidding  
22 procedures and to amend them, our position would be that they  
23 would come in and have to ask this Court for the right to amend  
24 those, before they would in fact be amended and be in a  
25 position to give those type of assurances to the person that

1 was bidding at the time.

2 Mr. Hertigan would also testify, Your Honor, that --  
3 that in the course of the URL sales and market value that the  
4 value of the 800.com is worth at least \$500,000, and in all  
5 fairness and open and honesty [sic] worth more.

6 So with that, Your Honor, what we would ask is for --  
7 for the debtor to follow the bidding procedures which were  
8 published and were authorized by this Court, to reopen the  
9 auction process, allow our bid of \$500,000 for the 800.com  
10 domain, and to allow us to close today because the money has  
11 been paid. It's in escrow with debtors' counsel and we're  
12 prepared to sign the asset purchase agreement right away.

13 THE COURT: All right. Thank you, Mr. Dillon.

14 MR. DILLON: Thank you, Judge. Appreciate it.

15 THE COURT: Does any other party wish to be heard?

16 MR. REPCZYNSKI: Hello, Your Honor. Tom Repczynski,  
17 on behalf of Mr. Loren Stocker, doing business as Vanity  
18 International. As the Court is aware, based on the  
19 representation made earlier, Mr. Stocker had agreed, after  
20 having filed his limited objection, he had agreed to continue  
21 that with the expectation, at least -- and this all comes as  
22 news to me as I sit here today -- but with the expectation at  
23 least that the sale was expected to be approved, and that the  
24 objection would thereby be mooted, since Mr. Stocker had  
25 authorized me to represent to the Court that his objection and

1 his right of last refusal bound up in his contract with Circuit  
2 City were all willing to go by the wayside with the approval of  
3 the sale, as had been -- as had been hammered down, if you  
4 will, with the debtors' agreement at that sale.

5           So whatever the Court decides to do today with regard  
6 to this new information, I would suggest that it would be  
7 inappropriate to accept this bid now at this time and sell this  
8 asset based on this bid and allow closing to go forward today.  
9 I think we would certainly accept and agree with the debtors'  
10 position that the sale was in fact conducted, that notice in  
11 fact was proper and that the debtor decided at that time, with  
12 the discretion given to it by this Court, to exercise its right  
13 to close the sale, as it did, and agree contractually, if you  
14 will, with the purchaser at that time to sell it for the price  
15 given. So --

16           THE COURT: Tell me how Mr. Stocker is harmed if I  
17 allow the bid that's before me today to go forward?

18           MR. REPCZYNSKI: Mr. Stocker, Your Honor, has 800.net  
19 among the assets that he controls. Mr. Stocker is harmed  
20 depending on who -- in whose hands 800.com falls. He has  
21 certain rights -- as the Court is aware, based on  
22 representations in the contract he has certain rights that he  
23 believes aren't subject to being terminated by the debtor, and  
24 believes that the sale to this purchaser is enough to protect  
25 him and that he can separately work out whatever deal he can

1 with this individual.

2 Subject to a reseller making this purchase and not  
3 knowing in whose hands 800.com might ultimately fall, his  
4 business is directly impacted. So his willingness to pay a  
5 certain amount of money and exercise that right of last refusal  
6 was completely contingent upon who the potential purchaser  
7 might be.

8 Under this scenario he has no way of knowing who the  
9 ultimate owner of that asset's going to be, whereas, with the  
10 proposed sale or the agreed to sale, he has the ability to  
11 negotiate directly and deal directly with that purchaser and  
12 thereby confirm for his own position what the value -- can be  
13 maintained on his 800.net. So --

14 THE COURT: So he would be, you would suggest,  
15 perhaps willing to exercise that -- that right, and actually  
16 pay more than the 500,000, as Mr. Dillon suggested it might be  
17 worth?

18 MR. REPCZYNSKI: I can only suggest that he ought to  
19 be given --

20 THE COURT: He's given the opportunity.

21 MR. REPCZYNSKI: -- given the opportunity. And keep  
22 in mind that the right to exercise that he has actually  
23 includes a 15 percent discount and a 10-day consideration  
24 period, based on any other offer that comes in. So again, none  
25 of that would allow this Court, or at least this purchaser, to



1 confirm this deal at this time with this dollar amount, where  
2 the Court has agreed with Mr. Stocker and the debtors had  
3 agreed to continue those matters over to another date, in the  
4 event the sale is not approved as it had been proffered.

5           So again, we agree with the position that it would be  
6 proper to approve the sale, based on the debtors' commitment.  
7 But in any event, if that weren't the case we don't believe the  
8 Court -- that it would be appropriate at this time for the  
9 Court to approve the alternative purchaser today.

10           THE COURT: All right. Thank you very much.

11           MR. REPCZYNSKI: Thank you, Your Honor.

12           MR. PERKINS: Good morning, Your Honor. Chris  
13 Perkins, of LeClairRyan. Judge, I'm joined with -- by Monica  
14 Blacker of the law firm of Andrews Kurth, from Dallas, Texas.  
15 Ms. Blacker represents Mr. Ivester, the winning bidder of the  
16 800 domain name.

17           Ms. Blacker was not anticipated to be here today  
18 until the events unfolded yesterday with this new bid. She  
19 consequently flew here last night, contacted my office this  
20 morning about admitting her pro hac vice. She's provided me  
21 with forms, pleadings which I will file this afternoon, but I  
22 orally move for her admission pro hac so she could be heard  
23 today.

24           THE COURT: All right. That motion is granted. Ms.  
25 Blacker, welcome to the Court.

1 MS. BLACKER: Thank you, Your Honor. I'm sorry for  
2 the last minute. We learned about the -- you know -- next  
3 potential bid at sometime after 4:00 p.m. yesterday. So I am  
4 here to encourage the Court to go forward with the bid  
5 procedures that were approved by this Court, which included a  
6 closing of the auction at Skadden Arps' office over a week ago.

7 And while I understand that notice wasn't given to  
8 potentially this domain website group, there was notice  
9 approved by this Court. And I find it hard to believe that  
10 really anybody who was in this business would not be aware of  
11 Circuit City's attempts to sell all of its assets, and it seems  
12 a little disingenuous that they would have just found out  
13 yesterday.

14 I mean, every time you pop up Yahoo, MSN, CNN,  
15 there's a discussion about the -- Circuit City closing its  
16 business and selling off its assets. It's been going on for  
17 months. So this last minute ditch effort is harmful to my  
18 client, who has spent four months dealing with this and working  
19 this offer, and was under the impression that this process was  
20 closed.

21 And it is patently unfair at this point to put them  
22 back into the bidding arena, and we would ask that the Court  
23 enforce the bid procedures and approve the auction as closed.  
24 And I would like to address a couple of the issues that were  
25 brought on by the additional purchasers -- of the alternative

1 purchaser's counsel.

2 First of all, there's really no evidence as to what  
3 the value of the domain name is, other than that the auction  
4 was conducted and closed, and that the winning purchase price  
5 was 250,000. I have no idea whether Mr. Hertigan is -- has any  
6 -- really, any ability to give us what the proper value is, as  
7 -- of this -- his business. There's no evidence, really, to  
8 support that.

9 THE COURT: There's evidence that somebody thinks  
10 it's worth 500,000, right?

11 MS. BLACKER: That he thinks it's worth 500,000.

12 THE COURT: Well, he's willing to pay that amount for  
13 it.

14 MS. BLACKER: True, Your Honor.

15 THE COURT: Okay.

16 MS. BLACKER: Bottom line is we conducted an auction.  
17 It was over eight days ago. It seems completely against all  
18 the fairness of the -- of this Court in that they -- we went  
19 through that process. We followed what the Court wanted, what  
20 the Court ordered, and I understand that the debtor had the  
21 right to leave the auction open.

22 They closed it. They also had the right under the  
23 auction -- the bidding procedures to modify their bidding  
24 procedures, which they did by closing the auction, and we would  
25 ask that the Court order the sale to my client.

1 THE COURT: All right. Thank you, Ms. Blacker.  
2 Before you get up, Mr. Galardi, is there anybody else in the  
3 courtroom that wants to be heard on this matter? All right,  
4 Mr. Galardi.

5 MR. GALARDI: This is a classic win/win for me, Your  
6 Honor. I either lose the argument and make money or I win the  
7 argument and I lose money. Your Honor, first, I just want to  
8 point out a couple facts. The reservation of rights in the bid  
9 procedures did in fact after consultation with the committee  
10 allow us to do what we did, and we did it. We did it with our  
11 eyes open.

12 Second, Your Honor, as the party reminded me that got  
13 up here, Stocker, there is a right of last refusal, which we  
14 rejected that -- we've rejected that agreement. We don't think  
15 it's binding, but that's a party that has an economic interest.  
16 We don't think at the 250 they're not going to bid and use the  
17 right of last refusal.

18 We find it hard to believe that 500 they'll do so. I  
19 understand the argument. Your Honor, and again, I think it  
20 just comes down to, we conduct a lot of auctions. When we've  
21 done so, it comes down to the integrity of what we're going to  
22 do with respect to when we say we're going to do something, and  
23 I think that's where the committee and we are.

24 We don't think there's an impropriety. Yes, it's  
25 unfortunate that in this day and age some people don't get

1 notice, but I don't think there's a due process right to that  
2 notice. It's not a due process concern. It may be that we're  
3 selling ourself short, and I think in this instance it has  
4 happened.

5 In other instances you can get a bidder, and they've  
6 done the best job possible to put the 500 before us. They said  
7 they're prepared to close. They've said they have the money.  
8 So it really comes down to, I think the debtors and the  
9 committee believe that we made that agreement with our eyes  
10 open, Monday of last week, and that we've asked the Court to  
11 live with that agreement and leave it to the Court, should it  
12 think we did the incorrect thing in hindsight and whether this  
13 auction should be reopened.

14 THE COURT: All right. Thank you, Mr. Galardi. All  
15 right. The Court has looked at the transcript that's been  
16 marked as Debtors' Exhibit No. 4 and considered the argument of  
17 counsel. The Court believes that the integrity of the process  
18 is paramount, and otherwise, we're never going to have any kind  
19 of way of conducting sales in the future.

20 And so the Court is going to approve the Ivester bid  
21 at the auction, approve the procedures that counsel did. I  
22 realize that that means that there's \$250,000 less that this  
23 estate is going to receive, but I think in the long term that  
24 that's the way that we'll promote getting the best bids and  
25 auctions generally going forward.

1           So Mr. Dillon, I thank you and your client for coming  
2 in today, but I just think that the integrity of the process  
3 needs to be preserved. So it'll be approved and I'd ask you to  
4 submit an order to that effect.

5           MR. DILLON: And the money's in the Streambank  
6 account, so we won't be looking to Skadden Arps to return it,  
7 Your Honor.

8           THE COURT: Oh, okay.

9           MS. BLACKER: Circuit City's --

10          MR. DILLON: Circuit City's account. I know it's not  
11 ours.

12          MR. GALARDI: Thank you very much, Your Honor.

13          MS. BLACKER: Thank you, Your Honor. May I be  
14 excused?

15          THE COURT: Yes, Ms. Blacker, you may be excused.

16          MS. BLACKER: Thank you for --

17          THE COURT: Thanks for coming in today.

18          MS. BLACKER: -- indulging me today.

19          MR. DILLON: Your Honor, may we be excused?

20          THE COURT: Mr. Dillon, you may be excused, as well.

21          MR. DILLON: Thank you, Judge.

22          MR. FREDERICKS: With that, Your Honor, I will turn  
23 to matter number 28, which is the debtors' motion to terminate  
24 the utility blocked account that was set up in connection with  
25 the first day. Just by way of background, Your Honor -- Your

1 Honor originally set up or approved a utility blocked account  
2 that operated much like the letter of credit.

3 In February when we announced the liquidations as --  
4 announced the -- or in January when we announced the  
5 liquidations and then got lease procedures approved, we set up  
6 a -- we revised that account to basically be a \$500,000 account  
7 that would never replenish.

8 And so the debtors deposited \$500,000 in a separate  
9 account for which utilities made demands. Since that -- since  
10 the store closing sales ended and the leases were rejected in  
11 March of 2000 -- or in mid-March of this year, there have been  
12 various utility requests made on that account, but ultimately,  
13 the debtors took every effort to close their remaining  
14 utilities associated with their leased premises.

15 There are a few remaining utilities associated with  
16 the few remaining pieces of real property that remain, for  
17 which the debtors will work with those utilities to set up  
18 separate adequate assurance to the extent those utilities  
19 request it.

20 Basically, this motion seeks to terminate the account  
21 effective 30 days from now, or excuse me, effective September  
22 30th. It would allow parties to submit a utility request to  
23 draw on the account for post-petition services. Any utility  
24 request that comes in after September 30th would be barred.

25 We provided notice of a motion to all of the

1 utilities. In addition to that we will provide notice of the  
2 order to all utilities. We have already received some requests  
3 on this amended form. And with that, Your Honor, there were no  
4 objections, the debtors would request that Your Honor approve  
5 the relief requested.

6 THE COURT: Does any party wish to be heard on the  
7 debtors motion for an order terminating the utility blocked  
8 account? Okay. There being no objection, that motion will be  
9 granted.

10 MR. FREDERICKS: Thank you, Your Honor. Just so --  
11 as Your Honor noticed, 31, I believe, has been adjourned.  
12 Thirty-two and -- I'm sorry -- 31 has been adjourned and 33 we  
13 dealt with earlier. Mr. Foley will address the remaining two  
14 contested matters. Thank you, Your Honor.

15 THE COURT: All right. Thank you.

16 MR. FOLEY: Your Honor, item number 32 is a motion by  
17 Export Development Canada. It's their motion. They -- I think  
18 they want to address the Court and we'll respond accordingly.

19 THE COURT: All right. Very good.

20 MR. HUTSON: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. HUTSON: Richard Hutson, on behalf of Export  
23 Development of Canada. Your Honor, we filed a motion to allow  
24 a late filed administrative claim. The debtors have -- had  
25 responded previously that they needed discovery in order to



1 respond to our claim.

2 We're just here today to request that the Court enter  
3 a scheduling order with a date certain for a hearing on this  
4 matter and allow for the debtors to have sufficient time for  
5 the discovery that they request. The debtors have filed an  
6 objection.

7 We've at this point received no -- no correspondence  
8 regarding to whether they contest the allegations, and at this  
9 point we -- when they previously objected we had no idea when  
10 the confirmation hearing was going to be, and at this point we  
11 do know, I believe, that scheduling this matter for sometime  
12 prior to the confirmation hearing would be a right that our  
13 client would like to request at this point

14 THE COURT: All right. Very good.

15 MR. HUTSON: Thank you.

16 MR. FOLEY: Your Honor, I think last time the matter  
17 was before the Court was before Ms. Boehm was out on maternity  
18 leave. Now that she's back -- this is backup, but nothing has  
19 changed, other than we're closer to a confirmation hearing  
20 date. We would ask the Court, because there's been no change  
21 in factual circumstance or certainly no change in prejudice to  
22 the movant, that the Court set this matter for a status hearing  
23 at the confirmation hearing, which is scheduled -- will be  
24 scheduled for, we hope, for November 23rd.

25 Your Honor, if you recall, this is -- this is a

1 motion by a credit insurer who provided credit insurance to a  
2 company called Tech Craft with respect to some goods that they  
3 allegedly delivered to the debtors that would allegedly qualify  
4 for 503(b)(9) status, had a timely filed 503(b)(9) proof of  
5 claim been filed.

6           There are certain allegations in a declaration that's  
7 attached from a paralegal about conversations and emails with  
8 Ms. Boehm of my firm, as well as some issues as to whether or  
9 not they saw what was posted on the KCC website as to the bar  
10 date, which was posted on November 13th.

11           They've said they didn't see it. As Your Honor  
12 knows, the excusable neglect standard is a fact intensive  
13 inquiry. It's a difficult standard for movants to meet and  
14 there's really, at this point, no need to go forward because  
15 there's no law to support a position in our view that a  
16 503(b)(9) creditor is entitled to immediate payment of an  
17 administrative claim.

18           And there -- the 503(b)(9) statute simply provides  
19 for a priority of a claim. It doesn't provide for allowing  
20 immediate payment. That's obviously in the Court's discretion.

21           THE COURT: Well, it'd be paid when all  
22 administrative claims are paid on the effective date of the  
23 plan.

24           MR. FOLEY: Exactly. So there's no distribution  
25 looming that they need to get their claim resolved or their

1 late motion resolved in front of, so that they can get a  
2 distribution. There's really no point or time or prejudice to  
3 anybody to incur the cost and expense that would be necessary  
4 in order to fully investigate the facts relating to this --  
5 these allegations, and then have a hearing on it.

6           So we would simply ask the Court -- again, all the  
7 other parties that are similarly situated have been continuing  
8 their request for late claim motions from time to time. One  
9 has already agreed to go to a confirmation hearing for a status  
10 conference and we can deal with these post-confirmation before  
11 we go effective.

12           THE COURT: Well, can they all be dealt with sort of  
13 in the same fashion? In other words, we have one hearing, or  
14 are they all going to be fact specific to each other and we're  
15 going to have to have separate hearings on all of them?

16           MR. FOLEY: Well, our intention was to take a look at  
17 all of these before we get to the confirmation hearing and to  
18 see if there's some commonality of issues that can be dealt  
19 with so that Your Honor could potentially make a ruling, either  
20 in a test case, as to what standard you're going to apply with  
21 respect to excusable neglect, Thompson, Pioneer Standards, so  
22 that we can then frame resolutions of these.

23           And obviously, we will be working with the committee,  
24 because depending on whether it's a late 503(b)(9) claim  
25 entitled to 100 cent dollars versus a general unsecured claim

1 that would not be 100 cent dollars, the economics may dictate,  
2 you know, the position that we want to take.

3 We don't want to unnecessarily spend estate dollars  
4 litigating things if there's not a benefit to those creditors  
5 who did follow the rules and did timely file proofs of claim.

6 THE COURT: All right. Thank you, Mr. Foley. Mr.  
7 Hutson can -- tell me why you're prejudiced and why this can't  
8 be set over for a status conference at the confirmation  
9 hearing, and we can deal with all these similar type of claims  
10 at one time?

11 MR. HUTSON: Your Honor, if -- we have no objection.  
12 If they're willing to look at this matter and do -- conduct the  
13 discovery that they necessarily need prior to confirmation  
14 hearing we don't object. The -- our only objection was, we  
15 haven't gotten anything from them.

16 We haven't gotten any way that they plan to challenge  
17 the veracity of the allegations that we've made. We haven't  
18 gotten so much -- and these matters have been unilaterally  
19 adjourned by the debtors previously without any, you know,  
20 communication to us.

21 So we would at least like for them to take a look at  
22 the facts. If it is that there's some issue there that needs  
23 to be resolved, we certainly don't want to object to the fact  
24 that, and we certainly understand, that these types of  
25 merchants are fact intensive and, you know, I argued previously

1 to the Court, we certainly take the position that we don't  
2 believe ours would be that fact intensive.

3 And when you recall the facts of our case, we're  
4 talking about one email that was sent to debtors' counsel  
5 requesting the bar date. We've accepted the fact that we  
6 missed the deadline to file. We've already accepted that. The  
7 only issue is whether the debtors contributed to it.

8 Now, I believe that can be dealt with very simply.  
9 It's either debtors' counsel sent the email or she didn't, but  
10 in either case, you know, we just want there to be some type of  
11 order entered or something showing that they've at least -- you  
12 know -- are going to conduct the discovery necessary to resolve  
13 this issue; and that's simply what we're looking for.

14 If the confirmation hearing, at that time they're  
15 willing to, you know, at least set a hearing date to hear this  
16 matter on that day, then we have no objection to that.

17 THE COURT: Okay. Thank you.

18 MR. HUTSON: Thank you.

19 THE COURT: All right. The Court is going to set  
20 this matter over for status conference at the confirmation  
21 hearing, and at that date we'll address scheduling -- a  
22 scheduling order that will set this as well as other, similarly  
23 situated claimants so that we can get those matters resolved.

24 MR. FOLEY: Thank you, Your Honor. The next item on  
25 the agenda that's under the contested list is item number 34.

1 This is Ms. Ashley Isaac's motion for relief from the automatic  
2 stay, and I believe she is on the phone, Your Honor.

3 THE COURT: Okay.

4 MS. ISAAC: I'm here, Your Honor.

5 THE COURT: All right, Ms. Isaacs [sic]. I've  
6 entered an order yesterday granting you authority to  
7 participate by telephone. So you may proceed on your motion.

8 MS. ISAAC: Yes, Your Honor. Thank you. Well, Your  
9 Honor, I would like to -- to file in court a motion for leave  
10 to refile a late claim as in the case of Greyhound Lines, Inc.,  
11 v. Donna Rogers, et al. Ms. Rogers was allowed to file a proof  
12 of claim because she had never received a bar date notice from  
13 the debtor of that case. Ms. Isaac also never received --

14 THE COURT: Excuse me, ma'am. Are we here -- I  
15 thought we were here on your amended motion for relief from the  
16 automatic stay.

17 MS. ISAAC: Well, yes, Your Honor, we are.

18 THE COURT: And what does that have to do with a late  
19 -- motion for a late filed claim?

20 MS. ISAAC: Well, I would also like to -- I was  
21 wondering if I could in court file a motion for leave to refile  
22 a late claim, and also amend that motion.

23 THE COURT: Have you filed -- have you filed a motion  
24 with the Court for leave to file a late filed claim?

25 MS. ISAAC: No, sir.

1 THE COURT: Okay. That's what you have to do.

2 MS. ISAAC: No, Your Honor. I'm sorry.

3 THE COURT: You can file that motion most certainly,  
4 but that's not before us today, okay? So you can file that  
5 motion and then that motion will come up at another time, and  
6 then we can be -- you can be heard in connection with that  
7 motion, but I can't entertain a motion that's not been filed  
8 with the Court.

9 MS. ISAAC: Yes, Your Honor. Thank you.

10 THE COURT: But what I would like you to address is  
11 the motion you have filed, which is your amended motion for  
12 relief from the automatic stay.

13 MS. ISAAC: Yes, Your Honor. Well, I filed that  
14 motion for relief seeking only insurance funds because I was an  
15 employee with the debtor, and I became subject to harassment,  
16 and because of that harassment it prevented me from -- it  
17 actually caused my health deterioration.

18 And I did file the motion for relief because right  
19 now the debtors have claimed themselves that the evidence is  
20 deteriorating and they're -- and they have not been in  
21 bankruptcy less than a year, and they're claiming that because  
22 of the bankruptcy the evidence that will help my case is  
23 actually going to deteriorate.

24 So when the bankruptcy is over my case will be  
25 prejudiced and will deny me due process, because my -- the

1 evidence in my favor will have most likely have been  
2 terminated. And I don't wish to cause burden -- undue burden  
3 or hardship to the estate of the debtors.

4 I only seek insurance funds. Whether it's five  
5 cents, \$5 or \$500,000, I do not wish to burden the estate of  
6 the debtor.

7 THE COURT: All right. So your position is that you  
8 have a claim against the debtor that you want to proceed with  
9 in another court and that you're willing to limit your claim  
10 only to the insurance proceeds that may be available, should  
11 you prevail in that action?

12 MS. ISAAC: Yes, Your Honor.

13 THE COURT: Okay. Thank you. Let me get debtors'  
14 counsel to respond.

15 MR. FOLEY: Your Honor, we -- we did file a response  
16 to the amended motion that sort of lays out the history of  
17 where Ms. Ashley's [sic] alleged claim stands. Your Honor, she  
18 was noticed and scheduled with a bar date. She did not file a  
19 proof of claim. Instead, she filed a lawsuit post-petition in  
20 violation of the automatic stay, which has subsequently been  
21 dismissed. So there is no pending action to go back to, to  
22 adjudicate a claim. The entire case has been dismissed.

23 THE COURT: Could the filing that she made, the  
24 lawsuit be treated as an informal proof of claim?

25 MR. FOLEY: I believe it was filed in Mr. Foley--



1 MS. ISAAC: Not to interrupt you, but it was May 3rd,  
2 but --

3 MR. FOLEY: It was --

4 THE COURT: Ms. Ashley [sic], you need to be quiet  
5 now, because Mr. Foley's addressing the Court, and you'll get  
6 another opportunity to address the Court when he's done, okay?

7 MS. ISAAC: Oh, yes, Your Honor. I apologize.

8 THE COURT: No problem.

9 MR. FOLEY: Your Honor, it was filed on May 13th,  
10 2009. The bar date was January 31st, 2009.

11 THE COURT: All right.

12 MR. FOLEY: So it was filed after the bar date and it  
13 was dismissed just a couple weeks ago by the District Court  
14 judge in Louisiana, I believe -- in Alabama, Your Honor.  
15 That's attached to our proceedings. She did file a proof of  
16 claim --

17 THE COURT: So you're saying that there isn't  
18 anything to --

19 MR. FOLEY: There's no --

20 THE COURT: -- list the stay, because there is no  
21 case to go back to?

22 MR. FOLEY: There's no case to go back to and there's  
23 no claim. Right now, she has lodged in July of '09 a late  
24 proof of claim. So I think what -- what I would suggest the  
25 Court do is deny the motion for relief from stay without

1 prejudice until -- unless and until Ms. Isaacs [sic] files a  
2 motion to deem timely filed the claim she just filed in July,  
3 for whatever reasons she may want to allege, and we'll deal  
4 with that similarly with all the other requests for permission  
5 to a late claim.

6 THE COURT: And that's what Ms. Ashley was saying  
7 when she first started, that she wanted leave to file a late  
8 filed proof of claim, because that's really the issue that we  
9 need to address in this matter, is that she needs to file that  
10 motion. And that's the motion we really need to have heard.  
11 That's what you're saying?

12 MR. FOLEY: And I believe this is -- this one's  
13 premature, and so I think it -- I think the motion for relief,  
14 since the case that she wanted to go back to is now dismissed,  
15 can be denied without prejudice.

16 THE COURT: All right. Thank you, Mr. Foley.

17 MR. FOLEY: Thank you, Your Honor.

18 THE COURT: All right. Ms. Ashley, do you wish to  
19 reply?

20 MS. ISAAC: No, Your Honor.

21 THE COURT: Okay. What Mr. Foley is suggesting is  
22 that I deny your motion without prejudice. What that means is  
23 that you can bring it again if you deemed it appropriate. But  
24 because the case has already been dismissed by the Court,  
25 there's no case for you to go back to if I granted the relief.

1 But what you really need to do is file a motion with  
2 this Court for leave to file a late-filed proof of claim, and  
3 that's the motion we really need to hear. And then based on  
4 whatever the Court decides there, then we can, you know, see  
5 how we proceed further. Do you understand that?

6 MS. ISAAC: Yes, Your Honor.

7 THE COURT: Okay. So that's what the Court's ruling  
8 is going to be, is I'm going to deny your motion here today  
9 without prejudice. And then I would encourage you to file that  
10 other motion for leave to file your late-filed proof of claim.

11 MS. ISAAC: Thank you, Your Honor.

12 THE COURT: You're welcome.

13 MS. ISAAC: Your Honor, may I be excused?

14 THE COURT: Yes, ma'am, you may be excused.

15 MS. ISAAC: Thank you.

16 MR. FOLEY: Thank you, Your Honor. The remaining  
17 items on the docket, items number 35 through 53, which are  
18 previously filed omnibus claim objections on for status, as  
19 well as items 54 through 56, which are omnibus objections that  
20 are up for the first time today, will be addressed by Ms.  
21 Boehm, and items 57 through 59 will be addressed by Mr. Galardi  
22 in the context of item number 60, Your Honor.

23 THE COURT: Very good. Thank you. Ms. Boehm,  
24 welcome back.

25 MS. BOEHM: Good afternoon. Thank you very much.

1 It's good to be back.

2 THE COURT: How's the baby?

3 MS. BOEHM: She's great.

4 THE COURT: Wonderful.

5 MS. BOEHM: Thank you. Items 35 through 53, as Mr.  
6 Foley mentioned, are status hearings on omnibus claim  
7 objections that have been adjourned from previous omni  
8 hearings, and are scheduled today for a continued status  
9 hearing.

10 We are continuing to work through those claims for  
11 which a response was filed with those claimants, and we would  
12 ask the Court to adjourn the status hearing on those omnibus  
13 objections to the October 15th hearing date.

14 THE COURT: All right. They'll be adjourned to  
15 October 15.

16 MS. BOEHM: Thank you, Your Honor. That takes us to  
17 item 54 on the agenda, which is the initial status conference  
18 for the debtors' 27th omnibus objection. They were very busy  
19 while I was gone, Your Honor. Omnibus objection number 27  
20 sought the disallowance of certain tax claims on the basis of  
21 no liability.

22 There were 85 claims included in that objection, and  
23 to date we have received 10 responses. For omnibus objection  
24 28, which is item 55 on the agenda, we sought the disallowance  
25 of certain amended claims. Those -- that objection included 94

1 claims, and we received three responses to date.

2 Omni 29, which is agenda item 56, sought the  
3 disallowance of certain duplicative claims, which included 53  
4 claims, and we have received one response to date. With  
5 respect to all the claims for which we received a response for  
6 omni 27, 28 and 29, we would ask the Court to adjourn those  
7 hearings over for further status conference to the October 15th  
8 hearing date.

9 And with respect to claims for which no response was  
10 filed we would ask the Court to order the relief requested in  
11 those omnibus objections. And as I understand the procedure  
12 has been, we have submitted one order for each omni and the  
13 exhibits reflect which claims are being adjourned and which  
14 claims are being disallowed or the relief requested accordingly  
15 in those objections.

16 THE COURT: That's fine.

17 MS. BOEHM: And we would propose to go forward with  
18 that procedure with these, as well.

19 THE COURT: All right. Very good. Does any party  
20 wish to be heard in connection with matters 54, 55 or 56? All  
21 right. The objections will be sustained as to all of the  
22 claimants for which no response was filed, and then for the  
23 claimants who filed responses, those matters will be carried  
24 over to October 15.

25 MS. BOEHM: Thank you, Your Honor.

1 THE COURT: You're welcome.

2 MR. GALARDI: Again, Your Honor, for the record,  
3 Gregg Galardi, and good afternoon.

4 THE COURT: Good afternoon.

5 MR. GALARDI: I think that brings us to matter 60,  
6 and I first want to thank Mr. Foley, who is on the cover of the  
7 Virginia Lawyer, on this topic for allowing me to do the  
8 argument here. My understanding --

9 THE COURT: Since he is the expert.

10 MR. GALARDI: He is the expert, and we have an  
11 autographed copy for Mr. Marcum. So he'll be signing outside.

12 (Laughter)

13 MR. GALARDI: Your Honor, the topic is really a  
14 threshold issue on 503(b)(9), and Your Honor, I also understand  
15 that my -- you helped protect my integrity back at Hershey Park  
16 when people were saying my name out so not to go to this topic.  
17 So I appreciate that, as well.

18 MR. GALARDI: The topic is simply, we've raised a  
19 number of objections, a number of objections to the definition  
20 -- actually, to the scope of the application of 503(b)(9) to  
21 various claims that have been filed. It is a dispute that I  
22 know well, having gotten a win in one circuit and a loss in  
23 another one with respect to what is the proper determination  
24 and definition of goods to be used in Section 503(b)(9).

25 As Your Honor is well aware, having read the statute,

1 and this is only one of the definitional applications of  
2 503(b) (9) that Your Honor will have to wrestle with I think  
3 over the next few weeks, months and maybe even years of this  
4 case is to, what is the kind of claim that actually fits within  
5 503(b) (9) .

6           We have taken the position in this case and I have in  
7 other -- in other jurisdictions that the definition of goods is  
8 to be interpreted according to the UCC definition of goods. We  
9 have objected, therefore, on a number of claims, Your Honor.  
10 And having looked through a number of the objections I think  
11 it's important to point out to all the objectors, I don't  
12 believe that this necessarily resolves or gets rid of any of  
13 those objections right now.

14           What we're really doing is a threshold issue to set  
15 the framework to go forward with respect to those types of  
16 objections. Yes, it may be bear significantly on a number of  
17 those, but for example, as I read the objections, certain of  
18 the states filed their objection as a -- I mean a claim as a  
19 503(b) (9) .

20           It's clearly a 50 -- (a) (8) or something like that.  
21 So we're not going to be disallowing claims based on this.  
22 What I think we are doing is taking the important threshold  
23 issue in sort of setting up for what the next evidentiary  
24 matter will be is whether Your Honor would accept a definition  
25 of the UCC and therefore, the predominant purpose test under

1 the UCC, which the Goody's court has accepted, or -- and I'll  
2 just put the split, because I know the two cases intimately --  
3 or whether Your Honor --

4 THE COURT: Well, didn't Judge Sontchi in the Goody's  
5 case say that he -- in a footnote -- he didn't need to reach  
6 the predominant factor test, and that -- so he didn't make a  
7 determination with regard to that?

8 MR. GALARDI: Correct. He only put his toe in the  
9 water. He didn't go all the way, Your Honor. He did say it  
10 would be the UCC. We believe, then, the question is --

11 THE COURT: He did, yes.

12 MR. GALARDI: -- whether or not it's the predominant  
13 purpose test, and that raises all sorts of issues between  
14 you're interpreting a federal statute, whether you use the UCC.  
15 The UCC, though adopted by most states, is a state law, and  
16 certain states vary with respect to what actual tests.

17 So we only have to take one step right now, would you  
18 rely on the definition of goods in the UCC. And what that  
19 actually means metaphysically is not clear to me, because  
20 certain states use the predominant purpose test. Some states  
21 don't use the predominant purpose test.

22 THE COURT: So which state do I look to, because I've  
23 been told by the Fourth Circuit I'm supposed to look at state  
24 law in interpreting these matters.

25 MR. GALARDI: Well, if you're looking at state law,



1 Your Honor, we believe it would be the Virginia law that you  
2 should adopt with respect to this. It is a sale of goods.  
3 Again, having had this dispute in Detroit, I can say you could  
4 look at each of the states by which the persons would have  
5 asserted reclamation under their applicable rates.

6 And so in this instance we could be in 48 states with  
7 respect to each 48 vendors and what they could have relied on.

8 THE COURT: And Puerto Rico.

9 MR. GALARDI: And Puerto Rico, you're right, Your  
10 Honor. And so I think we were just really getting first to the  
11 threshold issue. Again, do we go to the UCC or not? Do we go  
12 to some other "ordinary course" definition of goods? What I  
13 think is important about the Sontchi opinion is Judge Sontchi  
14 interprets the UCC to be "the ordinary course meaning of  
15 goods."

16 So therefore, there really is no other meaning,  
17 meaning of the word. And then, for example, if we have vendors  
18 in California delivering, then we can use the UCC there for it  
19 to go to state law. Or should we have a federal overlay to  
20 this entire use of the definition?

21 I'm not sure that Congress says you have to go to  
22 each state on this particular matter. That's only if you buy  
23 that it's a UCC and you believe that this is a reclamation  
24 issue. Your Honor may say, no, I don't think I need to go to  
25 state law.

1 I think we have to set a federal standard because the  
2 federal bankruptcy law applies, and therefore, you can go  
3 further to say that I think, you know, the general UCC law does  
4 apply a predominant purpose. So we'll adopt for bankruptcy and  
5 for purposes of federal statute a predominant purpose test.

6 There are obviously winners and losers in that  
7 analysis, Your Honor, and the debtors can win and lose on any  
8 particular case. For example, if you take a predominant  
9 purpose test and it turns out that there are some value of  
10 services there, that means you still have to pay the entire  
11 claim.

12 It does not mean you get to carve out the services.  
13 If you take what I'll call the Plastech view, you carve out  
14 services and you carve out the goods. Again, Your Honor, we  
15 think that the better reasoned case -- and again,  
16 unfortunately, legislative history here is -- to be candid, is  
17 weak at best.

18 Notwithstanding that, if you look at the two -- the  
19 place in which this statute came into effect and you look at  
20 the changes, it is under, in legislative history, a reclamation  
21 section, 1327 I think it is or something like that.

22 Second, it was hand and glove with the changes to the  
23 reclamation statute, which changed the priority of the  
24 reclamation claims and what you had to do. And essentially, we  
25 read it and we would advocate that the Court read it as a

1 catchall for reclamation claims where people did not actually  
2 document their right to reclamation properly.

3           So it's supposed to capture reclamation. And again,  
4 we think that supports the UCC definition, because reclamation  
5 is, at its heart, a UCC reclaimed goods. So what we've tried  
6 to argue and what we would advocate to Your Honor is, in the  
7 proper framework Congress was looking at the reclamation  
8 statute.

9           It changed it as a fallback position, because  
10 reclamation claimants, as we know, have a difficulty of  
11 documenting what they have. But it still comes down to the  
12 fact that they had to deliver goods within 20 days and the  
13 goods should be the same goods that you could "reclaim."

14           And therefore, the definition should follow the UCC  
15 definition, if you're going to apply a procedure. You also  
16 note that it's an administrative claim. So we have the general  
17 law that most jurisdictions have, that those are to be  
18 construed narrowly.

19           And so our view would be, one, adopt a UCC standard  
20 definition of goods, two, Your Honor may not have to go to the  
21 predominant purpose. I think Your Honor could say that the  
22 predominant purpose is the appropriate standard to apply. And  
23 then set for hearing evidence where the debtor could dispute  
24 with parties whether the predominant purpose of the delivery of  
25 goods.

1           So we have, for example here, a number of examples.  
2 One, bringing laminates and cabinets into our buildings. Okay.  
3 Did we hire them to perform services or did we buy the cabinets  
4 and the laminate? Did we buy the signs to have them install  
5 them, or did we have the signs because we wanted signs?

6           Did we have concrete and fixtures delivered to the  
7 property because we wanted to buy concrete from this person, or  
8 they wanted to do -- do renovations on our buildings? If you  
9 don't do that, then we're going to have to, and I think this  
10 goes to gamesmanship, and I'm not sure that people will go do  
11 this on their invoices, but then they're going to demarcate  
12 their invoices as, here's the goods, here's the materials and  
13 so now I got to go through everyone of those now and say, okay,  
14 I have to pay for the goods; I don't pay for the materials.

15           Now, Judge Shefferly at Plastech said, well, I'm  
16 sorry; that's maybe what you're going to have to do. I happen  
17 to disagree with that position because, one, you never know  
18 what the value of those goods is because now, you look at the  
19 invoice, and would I have bought the goods, would I have bought  
20 the concrete from one of the protected people here if I was  
21 really interested to buy concrete.

22           Is there embedded costs in that? That's why I think  
23 the UCC's gone to the predominant purpose. First, make the  
24 decision of predominant purpose. If you can show that the  
25 predominant purpose was to do services, then that's the end of

1 the matter.

2 If you do show that the predominant purposes is  
3 goods, then that's the end of the matter. We think that that's  
4 the -- one, the approach that, to the extent any congressional  
5 intent could be deemed here at all -- we would think that that  
6 was consistent with the congressional intent.

7 Two, if you just look at the way the statute works  
8 with reclamation, it seems the right way to work it. Three,  
9 the definition of the UCC is a common sense definition, and  
10 four, the Bankruptcy Code uses the word, "goods and services,"  
11 and there has to be a distinction between goods and services.

12 So then we can only get into the nuances of what UCC  
13 law apply. For example, I've had to wrestle with under certain  
14 states natural gas is a good. In certain states it's not a  
15 good. Do we have one federal "UCC definition," or are we going  
16 to have state definitions?

17 But until we can say it's the UCC, you don't have the  
18 next step of which UCC? Do I apply federal common law, which  
19 we can create, or do I apply state law for each state, because  
20 this vendor in this case has a better UCC law than in this  
21 case. Your Honor, it's absolutely --

22 THE COURT: That doesn't seem a very practical way of  
23 proceeding, though. There's got to be a federal definition for  
24 the word.

25 MR. GALARDI: Your Honor, that would --

1 THE COURT: But we look to state law to try to help  
2 us get the federal definition.

3 MR. GALARDI: Your Honor, that's exactly our  
4 position. I think, you know, again, though Judge Sontchi  
5 didn't get there, though Judge Shefferly wouldn't get there,  
6 I'll guess I'll have -- you have the opportunity to get there,  
7 because I think the only workable solution with the federal  
8 bankruptcy statute is very much like the ethics rules for  
9 lawyers.

10 You look to the state, but you create a model,  
11 federal code to interpret the federal statute in these  
12 instances, and adopt what you believe is the workable  
13 definition that's consistent with the congressional intent.  
14 Congressional intent is at best sparse here, but it is in the  
15 context of a reclamation statute.

16 It makes sense to use a UCC definition of goods. And  
17 then you look at what the majority opinion of the states are  
18 UCC, and the majority is a predominant purpose test. And if  
19 the majority is a prominent purpose test, though you can't say  
20 that's what Congress intended -- I don't think Congress  
21 intended anything -- that's the most workable definition and it  
22 sets up what the evidentiary issues for the parties, was the  
23 intent of the predominant purpose of a transaction to have  
24 services rendered or to have goods.

25 I can only give you some examples here of if we sent

1 out a stereo to put in parts, to bring back, did I sent it out  
2 to be serviced or did I send it to do parts? And in the  
3 Plastech problem that I've had is we send motors out. They put  
4 little pieces in. They send it back.

5 Now, we got to figure out what the price of those  
6 little pieces are. Now, that's not for Judge Shefferly a  
7 reason to say those aren't goods, but I think it's an  
8 unworkable federal scheme, and this is a federal statute that  
9 has to set a standard across the country.

10 And Your Honor has the opportunity to do that. I  
11 think Judge Sontchi has gotten it right with the UCC, and the  
12 only question now is we haven't had to have the issue of  
13 predominant purpose. I think you will have that issue raised.  
14 I don't know if Your Honor has any other questions for me.

15 THE COURT: In applying the predominant purpose test  
16 do you look at the cost of the goods versus the cost of the  
17 services, and whichever is more on the scale, if that's what  
18 you apply, or do you look what the intent of the parties was as  
19 far as what the they really wanted, and does that get into  
20 subjective analysis? How do you apply the test?

21 MR. GALARDI: Your Honor, I think you apply it  
22 exactly how the UCC does, and I don't think it's a simply slam-  
23 dunk of where the goods are more expensive or not expensive is.  
24 And again, it is subjective. It is an evidentiary matter, but  
25 it's testimony that I would anticipate putting on from our

1 witnesses saying, why did you contact this person and for what  
2 purpose.

3           If they need to use a very expensive piece, but you  
4 were doing it because of their expertise, and they're the only  
5 one that could do this, then that may be a small -- it may be a  
6 very expensive piece, but you contacted them because of the  
7 professional services they can put in there.

8           So I don't think you can do a bright line where we  
9 have more services and goods in our invoices. That's -- you  
10 know -- that would even make people, if they were really  
11 manipulative, to jack up the price of the goods and down-price  
12 their services, so in case of a bankruptcy.

13           I think it's really the question is, why did you hire  
14 those people. Why did you ask them to perform x or y or z?  
15 Were you going to them as a marketer of goods, or are you going  
16 to them as a provider of services? Again, my dispute, say,  
17 with Plastech on the Astroturf case was, we weren't calling  
18 them to deliver salt and silicon to do the parks.

19           We were calling them to remove the ice and the snow,  
20 and it was a happenstance that they used parts. I think that's  
21 an unworkable standard. And so through the judge said, well,  
22 they did deliver this, but we could have bought, and the  
23 testimony quite there was, you could have bought sand and salt  
24 and done it yourself.

25           I didn't go to them for that. I gave them to perform



1 a service. He said, nonetheless, you got salt and sand and  
2 chemicals; you're going to pay for that. That to me is an  
3 unworkable standard and that's why I think the predominant  
4 purpose and that's why I think the UCC is the appropriate  
5 standard.

6           The other aspect of this is, this is what the vendors  
7 who sell goods understand to be the standard. They may not  
8 like it, but outside of bankruptcy this is what would govern  
9 their right to reclaim this. They can't reclaim it if it's a  
10 service.

11           So consequently, I think it does the least damage to  
12 what I'll call the commercial relationships that exist,  
13 regardless of the bankruptcy. So that would be another reason  
14 we would advocate the predominant purpose. And then, yes,  
15 you're going to have disputes like you have under the UCC, but  
16 they're no different than the disputes you would have under the  
17 UCC and it's not a simple, you paid more for goods than  
18 services.

19           It's, what were the intentions of the parties and how  
20 do you hold yourself out to sale? What you see in some of  
21 these objections is, well, I gave you a bus to transport goods,  
22 or, I gave you a security guard. You know, a security guard is  
23 not a good under any commercial sense of the UCC.

24           THE COURT: No. It's the adoption of the 13th  
25 Amendment.

1 MR. GALARDI: Exactly. So and you're not going to  
2 reclaim -- you may call them back, but you're not going to  
3 reclaim the security guard. So that's the kind of manipulation  
4 that's going on side -- that side, from the vendor's  
5 perspective. So the -- clearly, why I retained them was to  
6 perform a service.

7 Why I asked for somebody to come in -- and I'm not  
8 trying to put the rabbit in the hat on any of these people, but  
9 why I hired a security service to install -- it's not because  
10 they used this little wire and this box. It's because they  
11 could put a whole system together, and I'm asking them to  
12 perform a service.

13 Inevitably, they had to put some piece of good in my  
14 property. They're not going to reclaim that under the UCC, and  
15 I don't think, therefore, they should get the 503(b)(9) claim  
16 under the Bankruptcy Code. And I think those are why they have  
17 to go hand in glove.

18 THE COURT: All right. Very good. So today what  
19 you're asking me to do with regard to the objection that you  
20 have filed to these claims is -- is basically a motion for a  
21 partial summary judgment on what is the standard to be applied  
22 as far as goods is concerned and whether or not the predominant  
23 purpose test be applied in these cases.

24 MR. GALARDI: That is exactly right, Your Honor.

25 THE COURT: And the --

1 MR. GALARDI: And that's not to allow or disallow any  
2 claim. Obviously, there will be a dialogue once you've set the  
3 standard. As to whether the parties want to go forward and  
4 meet that standard or not, we hope that it'll resolve and  
5 expedite a lot of the issues going forward.

6 THE COURT: All right. Very good. Thank you.

7 MR. GALARDI: Thank you.

8 THE COURT: All right. Does any party in the  
9 courtroom wish to be heard in connection with this matter?

10 MR. PERKINS: Good afternoon, Your Honor. Chris  
11 Perkins, on behalf of Schimenti Construction Company, LLC.  
12 Schimenti furnished goods and services in connection with its  
13 build-out and remodeling of several of the retail locations.

14 And it filed a 503(b)(9) claim for approximately  
15 \$47,000, which amount represented solely the goods portion of  
16 that contract. It filed a separate and much larger claim  
17 related to the labor involved in that contract. And I would  
18 agree with the Court and the debtors that there are two issues  
19 before the Court today: what is the definition of goods, and  
20 then whether the predominant purpose test applies.

21 And I think as to the first issue I'm not sure that  
22 there's a whole lot of debate over that, what the definition of  
23 goods is. I've managed to skim through most of the responses,  
24 and I don't think a lot of folks -- and of course, they'll  
25 speak for themselves -- take issue with the definition of goods

1 being that defined by the UCC under section 2105, relying on  
2 the concept of movability.

3 And I certainly on behalf of Schimenti don't oppose  
4 that definition and agree with the debtors that that definition  
5 should apply for the term goods. It's as to the second issue  
6 and the treatment of the predominant purpose test that I depart  
7 ways with the debtor, and for a number of reasons.

8 The debtors are suggesting that this is an all or  
9 nothing approach, that the predominant purpose test should  
10 apply, which as the Court well knows, looks at the overall  
11 transaction and then picks one or the other. Is it a good or  
12 is it a service, and it can only be one under the predominant  
13 purpose test. Winner take all.

14 Schimenti respectfully disagrees with the debtor that  
15 that's the proper position to take and suggests --

16 THE COURT: Well, if I'm looking at the definition of  
17 goods under the UCC, don't I have to take that definition with  
18 how it's been interpreted by, you know, the various states or  
19 the majority of states that have looked at it for purposes --  
20 and it does arise in the context of the reclamation statute,  
21 and factor that in?

22 MR. PERKINS: Well, I think reclamation is a  
23 different issue, and I'm going to address that in a moment.

24 THE COURT: Okay.

25 MR. PERKINS: But as it comes to the predominant

1 purpose test, you don't have to look at that for you to  
2 determine if it's a good. Okay. I think it's a two-step  
3 process. First, is it a good? Okay. It's a good. Now, was  
4 it involved in a mixed transaction where there was also  
5 services involved?

6           You can adopt the UCC definition of good as a  
7 movable, identifiable object before you get to the predominant  
8 purpose test. So for example in Schimenti, it's construction.  
9 We provided doors, windows, lumber, things like that. Those  
10 are goods. I don't think anybody would suggest they're not.

11           Now, we also provided labor to install it. Then you  
12 get to that second step. Okay. Do we apply a predominant  
13 purpose test or not? But the predominant purpose test doesn't  
14 help you decide whether it's a good or not. That's what that  
15 first concept is all about. All right.

16           So -- and I'm in agreement with that. Good is what  
17 the UCC says is good. All right. Then we get to whether the  
18 predominant purpose applies, and I'm submitting to the Court  
19 that that -- that it should not apply, and for a number of  
20 reasons, but first of all, being that it's an all or nothing  
21 approach.

22           I believe that we can apportion the claim as to the  
23 goods and the labor, as Schimenti has done and as many of the  
24 other creditors that are subject to this omnibus objection have  
25 done, and that is goods would get the administrative priority

1 claim under 503(b)(9) and the labor would fall in under the  
2 unsecured in our creditors' pool.

3 Now, the reason I take this position is for a couple  
4 reasons. First of all, there is no authority in the Fourth  
5 Circuit or anywhere in the country for the debtors' position  
6 that the predominant purpose applies. As the Court pointed  
7 out, Goody's does not take that position, and there are no  
8 cases out there that do.

9 The cases cited by the debtor that talk about the  
10 predominant purpose test are nonbankruptcy cases, cases  
11 involving contract disputes. For example, the Princess Cruises  
12 case in the District Court in Virginia, those are nonbankruptcy  
13 cases that deal with contract disputes, and the reason they  
14 were talking about the predominant purpose test is because they  
15 were trying to decide what law are we going to apply here.

16 I have a contract. Is it governed by the UCC or is  
17 it governed by common law of contracts? And in order for me,  
18 the District Court and Princess Cruises to decide which law to  
19 apply, I have to apply the predominant purpose test and decide  
20 whether this transaction was a goods transaction or was it a  
21 services transaction.

22 So it was in that framework that you looked at the  
23 predominant purpose test to help the Court decide what law to  
24 apply. That's not the question here. This Court isn't trying  
25 to figure out which law to apply. This Court is assessing

1 whether these claim for goods are entitled to 503(b)(9) status,  
2 not do we apply UCC or do we apply contract law.

3 And that's the reason why Judge Shefferly in the  
4 Plastech case said predominant purpose is not the right test;  
5 we don't look at that here. We're talking about 503(b)(9).  
6 That case is right on point. I'm sure the Court's had an  
7 opportunity to look at it. If you haven't, I --

8 THE COURT: I've got it right here.

9 MR. PERKINS: Okay. That case is procedurally in the  
10 same posture we are now. The debtor filed an omnibus objection  
11 to a number of 503(b)(9) claims where it says, these are  
12 misclassified, these aren't goods, and several of the creditors  
13 came forward with their responses. The Court look at the very  
14 same issues.

15 And this is what the Court decided, and I think it's  
16 pretty instructive to walk through that case briefly. The  
17 Court said goods is the UCC definition of goods. Second step,  
18 do I apply the predominant purpose test? Court said, no, I'm  
19 not going to apply it, and here's why; it's all or nothing  
20 test; if I adopt this test I'm going to reward creditors whose  
21 transactions are predominantly goods, but contain some  
22 services; give them 503(b)(9) status for their entire claim,  
23 even though some of those services no one's even arguing are  
24 entitled to anything better than an unsecured priority.

25 Similarly, it's going to penalize folks whose claims

1 are predominantly services, but there's no question there are  
2 bids involved. So it's an imperfect test, certainly not  
3 equitable, and that's what we're all about here in bankruptcy,  
4 under a 503(b)(9) analysis, as opposed to the Princess Cruises,  
5 where they're just simply trying to look at which law applies.

6 The second reason in Plastech, which I think is  
7 instructive, is let's look at the statute. It's right there in  
8 plain English, and 503(b)(9) says that administrative priority  
9 is given to the value of any goods received, any goods  
10 received. And it's the word "any" that I believe is very  
11 important to the analysis here.

12 They're not just talking about goods, but the statute  
13 says the value of any goods received, which would indicate to  
14 me that Congress was intending to allow 503(b)(9) status to any  
15 goods, regardless of the fact that they might be involved in a  
16 transaction that also includes services.

17 And to be true to the meaning of the statute and the  
18 plain language of the statute, that's what we have to agree.  
19 We don't take predominant purpose and throw out the goods  
20 portion, because the statute actually says the value of any  
21 goods received.

22 And Your Honor, I might add one more that's no in the  
23 Plastech case, but let's think of an example where we decide  
24 we're going to apply the predominant purpose test and --

25 THE COURT: Well, don't I have -- aren't I ignoring,



1 then, the second part of the statute which talks about -- where  
2 it says which goods have been sold fo the debtor? I mean,  
3 isn't that where this predominant factor test comes in, about  
4 whether or not we were selling goods to the debtor?

5 And going back to Mr. Galardi's argument, you know,  
6 if you were -- were you really selling concrete to the debtor  
7 or were you, you know, molding the concrete, you know, into a  
8 sidewalk or --

9 MR. PERKINS: Right.

10 THE COURT: -- or whatever.

11 MR. PERKINS: Right. Well, you're doing both; you're  
12 doing both. You're both selling the product and you're  
13 installing it. If the debtor wanted to, it could have gone and  
14 bought the product and then just hired somebody to install it,  
15 but it hired somebody to do both. So I believe you can break  
16 it down.

17 THE COURT: But isn't -- all I was getting at, isn't  
18 it in that context that the predominant purpose test comes into  
19 play here, as far as whether or not you're going to do the  
20 demarcation that you're talking about and set aside the goods  
21 and set aside the services, if you -- to the extent you can  
22 possibly do that, and that'd be a very fact intensive thing or  
23 whether you're going to look at, okay, what was the overall,  
24 you know, intent here? Was it to sell services or was it to  
25 sell these particular goods?

1 MR. PERKINS: I -- yeah.

2 THE COURT: And then in that context if we're looking  
3 at the UCC and what the overall purpose of the statute was, you  
4 know, could you have reclaimed your goods? You know, could you  
5 have gone back and gotten your concrete or --

6 MR. PERKINS: Right.

7 THE COURT: -- had it already set? And so there  
8 wouldn't have been a reclamation right at all.

9 MR. PERKINS: Well, I think that's a proper  
10 description of what the predominant purpose test is all about  
11 and why it -- why it does what it does. I still maintain, as I  
12 said before, that it's not the right case to be applied in this  
13 framework.

14 And as it relates to reclamation -- and this was  
15 specifically looked at in the Plastech case -- the Court there  
16 said, I don't see anywhere, where 503(b)(9) says anything about  
17 reclamation. In fact, the statute says any goods. It doesn't  
18 say only those goods that are reclaimable.

19 It doesn't put any qualification on goods. It's the  
20 -- you'd have to imply that those are reclaimable goods. And  
21 it doesn't say that. It actually says, any goods. So for  
22 those reasons, the Court there said that that's not  
23 appropriate. It's not a reclamation concept.

24 It smells like it, but it's not, and it's not in the  
25 language of the statute. Had they wanted to put it in there,

1 they could have, but they didn't. In fact, they went even  
2 further and they put the word "any goods" in there, which  
3 indicates that what they meant was any goods, whether they're  
4 reclaimable or not, whether they're involved in a combined  
5 mixture of services and goods or not.

6           So Your Honor, I think -- well, the Court obviously  
7 doesn't have a lot of law to go on. The Plastech case I think  
8 is well-reasoned. It addresses all of the issues. As it  
9 relates to the efficiency concept and do we have to have a  
10 whole lot of fact-intensive inquiries here, in this case we're  
11 only talking about -- I think there's only 20 claimants who  
12 responded, and many of those were taxes and many of those have  
13 changed their position.

14           I would submit that we're down to maybe a handful at  
15 this point. So I don't think the deficiencies really -- really  
16 weight in. And I would urge the Court to adopt the Plastech  
17 analysis, adopt the definition of goods under the UCC, but  
18 reject the predominant purpose test.

19           THE COURT: When your client sends a bill to the  
20 debtor --

21           MR. PERKINS: Yes, sir.

22           THE COURT: -- does it break down the services and  
23 break down the goods, or do you have to go back and try to  
24 reinvent all that after the fact?

25           MR. PERKINS: I can't say what the ordinary course is

1 for my folks. But in our proof of claim, which is some 140  
2 pages long, it is broken down.

3 THE COURT: I saw that.

4 MR. PERKINS: Now, whether they went back and did  
5 that for the proof of claim or whether they --

6 THE COURT: That's what I -- that's why I asked that  
7 question.

8 MR. PERKINS: I don't know the answer to that,  
9 frankly, Your Honor.

10 THE COURT: Okay. Fair enough. Thank you, Mr.  
11 Perkins.

12 MR. PERKINS: Thank you.

13 MR. REPCZYNSKI: Good afternoon again, Your Honor.

14 THE COURT: Good afternoon.

15 MR. REPCZYNSKI: Thomas Repczynski, appearing in this  
16 matter on behalf of Graphic Communications, Inc., one of the  
17 respondents to the fifth omnibus objection. Like my colleague  
18 before me, I think it's easy to set up an argument where one  
19 doesn't exist.

20 I think I can respectfully stand before the Court and  
21 say, we agree the UCC definition of goods applies. I think  
22 that gets us a long way, perhaps, because I don't know where  
23 else, you know, we would be looking, although the debtors --  
24 you know -- debtors' counsel stands before the Court and says,  
25 okay, well, what does that now mean.

1 To say that the UCC applies obviously brings with it  
2 the baggage that was discussed about deciding what state law  
3 applies or does the Court somehow adopt a UCC definition and  
4 make that federal law, because that's what was intended by the  
5 -- by the Congress. I think --

6 THE COURT: Well, the other that have looked at it,  
7 looked at what they call the ordinary meaning and they've come  
8 to the same thing, that it's movable property. They've looked  
9 at Black's Law Dictionary and said, whoops, it means movable  
10 property there and they've looked at Webster's, you know.

11 So we can look in a lot of different places and you  
12 sort of circle back to the UCC definition. This is probably as  
13 good a definition -- and in looking at all of the papers that  
14 was filed, didn't look to me like anybody was really taking  
15 issue with, you know, how we were going to define goods as  
16 movable property.

17 MR. REPCZYNSKI: I think that's right, Your Honor,  
18 and I know I can say specifically with regard to Graphic  
19 Communications' claim, we feel like there's been a little bit  
20 of a bait and switch here today, and I don't think there was an  
21 expectation that we were going to come in here and simply  
22 discuss esoterically.

23 The Court has now sort of framed it and debtor agreed  
24 to frame it in the context of a partial summary judgment, but  
25 coming in today, we had a claim objection and we had a response

1 to that objection, and it was agreed that we're going forward  
2 on this, it's not going to be continued.

3           So we came in expecting that there is enough here,  
4 with regard at least to my client's claim, we believe, to  
5 resolve the objection and find that this is a 503(b)(9). So I  
6 can appreciate somewhat that now we're simply looking at it and  
7 say, let's look and decide what are goods; then we'll go back  
8 and we'll apply it to each case.

9           But of all the examples that were given by debtors'  
10 counsel and the -- it's not a situation there; it's not a  
11 situation where -- and we went through the various types of  
12 facts, my client produced leaflets, over 10 million Circuit  
13 City flyers that we all get in our mail -- or not in the mail  
14 necessarily, could be in the newspaper, but the leaflets, over  
15 10 million of them, in this case for a specific job.

16           But with that in mind, the ability to say, one, that  
17 these pamphlets that were produced, these leaflets that were  
18 produced aren't movable or aren't goods, for me really sort of  
19 gets us beyond, do we have to even sit here and decide as a  
20 threshold matter, or can we simply move and say, well, there  
21 are goods; they are movable; we agree; we accept the definition  
22 as it's proposed; as between the parties, then, there's no  
23 disagreement as to what is or is not a good.

24           We have leaflets. We have over 10 million of them.  
25 And we billed -- and we billed for the production of them. The

1 question then becomes, at least with regard to Graphic  
2 Communications, where do you draw that line. If I have a  
3 movable good, are we stuck in that same sort of -- the Court  
4 used the pouring the concrete examples, because it was  
5 Schimenti in front of it.

6           There then became a question of is it reclaimable.  
7 And you somehow find that, well, ultimately, I think the Court  
8 agrees yes, you could take that concrete back. It may not --  
9 it may --

10           THE COURT: But would you.

11           MR. REPCZYNSKI: Would you, right? And I'd argue in  
12 a different context, ultimately, through the Bankruptcy Court  
13 in Norfolk all the way through the Fourth Circuit a number of  
14 years ago about, did you have a purchase money security  
15 interest in something that ultimately got attached, and  
16 frankly, it wasn't discussed in a reclamation context, but  
17 similarly, could you and would you and did you have those  
18 rights.

19           We don't have to look at that for purposes of my  
20 client's claim. So as I thought about that, because clearly,  
21 there are goods. There are leaflets that were reclaimable. So  
22 when the Court was asked to find that test, what makes sense,  
23 to have to determine a predominant purpose, I don't the Court  
24 has to go there, at least not with regard to Graphic  
25 Communications.

1           So I presume there are other situations where the  
2 Court wouldn't have to go that far, either. The Court raised  
3 the question -- I hear Schimenti's counsel saying it -- you  
4 don't have to -- it's not our reclamation issue, can they be  
5 reclaimed.

6           But if the Court's inclined to go there, if the  
7 debtors' inclined to have us go there, then I believe that the  
8 Court should find and can find here today on the facts before  
9 it that Graphic Communications is making a 503(b)(9) claim for  
10 goods, reclaimable, movable goods, as that is understood. Now,  
11 the Court has before it --

12           THE COURT: But you've got a different issue, which  
13 apparently is not before me today, and that is whether you sold  
14 the goods to the debtor, and you know, did the debtor take  
15 title to those pamphlets. Or were they delivered to a  
16 newspaper and belonged to the newspaper and the newspaper  
17 distributed them.

18           And you know, so -- but that's -- as I understand --  
19 that's why I was trying to get some closure around it when I  
20 was asking Mr. Galardi what was before me today and what -- and  
21 that's why I said I was just going to decide the two issues of  
22 goods or predominant purpose test, and not reach that issue,  
23 which is whether or not title passed to Circuit City in those  
24 pamphlets; in other words, there was a sale of a good.

25           MR. REPCZYNSKI: I understand the Court's asking. I



1 can only tell you, that's where I mentioned the bait and switch  
2 sentiment, because I felt that --

3 THE COURT: Because you were prepared to address  
4 that.

5 MR. REPCZYNSKI: Well, what I was prepared to say  
6 was, debtor did not raise in its objection the issue of the  
7 title, the issue of the value that it received. So our  
8 position as we sit here before the Court is, we had a claim  
9 objection where value was not questioned as to whether or not  
10 Circuit City received value for the goods or nongoods, as they  
11 might be.

12 Merely, the only objection raised by Circuit City is,  
13 is it a good or not a good, essentially leaving before the  
14 Court, I believe, if you find that it's a good, the debtor has  
15 not raised a separate objection, then my claim is a good one.  
16 They stand before the Court here today -- and I only heard  
17 literally for the first time that, oh, no, no, we're simply  
18 making this a threshold issue with regard to all these claims  
19 and we want the right to come back later and make other  
20 determinations.

21 I get it. I understand why they're doing it, but I  
22 certainly appreciated the Court's asking and looked forward to  
23 the respond, and was only then surprised to hear that we're  
24 just here on what was ultimately determined to be a partial  
25 summary judgment.

1 My client put forward a response to the objection  
2 supported by Mr. Drake's affidavit and the bills that apply  
3 there. and I think to the extent there is any question at all  
4 on that -- on the title issue, because again, I don't think you  
5 have to go there, but the question, really, for Graphic  
6 Communications was, here, remove-ability, not a question.

7 As the Court's -- we sold goods. Clearly, the  
8 invoices there are for, here's your 10 million. In fact,  
9 there's even a reference on the invoices as put forward there  
10 that says, title to the paper that -- as used in the production  
11 of this does not pass until the paper is delivered and paid  
12 for.

13 So there's a question of the title, it being used or  
14 implemented, I guess, in the -- in the billing itself. These  
15 flyers were produced. That's what they were -- that's what  
16 they were asked to do. The Court wants to look to the  
17 predominant purpose test, I think we're prepared to say, the  
18 predominant purpose test with regard to Graphic Communications,  
19 as I thought we were supposed to be prepared to do today, was  
20 to produce and get the flyers out there.

21 Circuit City was trying to avoid going into  
22 bankruptcy. It was having sales. It was trying to make  
23 everyone aware of the fact they should come to Circuit City and  
24 sell [sic] these products. We did what we were asked. So our  
25 arguments were based on the only one case that debtor put

1 forward, the in re Deere case out of the Southern District of  
2 Mississippi, a 2007 bankruptcy case, the only one that it can  
3 point to in the 503(b)(9) context with regard to calling what  
4 Graphic did here advertising services.

5 And so I stand before the Court to say, this was not  
6 advertising services as contemplated by that Deere case and the  
7 cases that it relied upon. The only cases that -- well, Deere  
8 itself and the cases that it relies upon were YellowBook  
9 advertising, where there's a -- the contract for the taking out  
10 of an ad in a book and whether or not that itself was deemed to  
11 be a service provision or a good. Under the circumstances --

12 THE COURT: So you're saying that, if I understand  
13 your argument, just so I can be clear on it, that I should  
14 apply the predominant purpose test, but your claim would pass  
15 the predominant purpose test for the reasons that you've just  
16 outlined.

17 MR. REPCZYNSKI: Close, but --

18 THE COURT: Okay.

19 MR. REPCZYNSKI: -- I don't think you need to apply  
20 the predominant purpose test, but clearly, if the Court decides  
21 to go there with regard to Graphic Communication, our position  
22 is we absolutely satisfy it. And the cases that are cited to  
23 the Court -- in fact, I've included for the Court with -- with  
24 our pleading -- indicate that the production of a movable item,  
25 such as this pamphlet or leaflet or however you want to

1 determine it as Graphic Communication provided, is wholly  
2 different from the notion of advertising services as is the  
3 only position the debtor -- debtors have taken with regard to  
4 Graphic Communications' claim.

5           So should the Court determine that the predominant  
6 purpose test is necessary, we don't think the Court needs to go  
7 there. You have these movable goods for us. But if the Court  
8 goes there, then yes, we do satisfy that test.

9           THE COURT: All right. I understand.

10          MR. REPCZYNSKI: Thank you, Your Honor.

11          THE COURT: Thank you. Does any other party in the  
12 courtroom wish to be heard? Mr. Hutson?

13          MR. HUTSON: Good afternoon, again, Your Honor.  
14 Richard Hutson, on behalf of U.S. Signs, Incorporated. We were  
15 a part of the debtors fifth omnibus objection. We filed a  
16 503(b)(9) claim, I believe somewhere in the nature of \$108,000.  
17 I, like the gentleman before me, came here prepared to argue in  
18 response to debtors' objection.

19               We certainly don't have an objection to the use of  
20 the UCC definition of goods. I made that argument in my brief,  
21 Your Honor. And like the gentleman before me, I certainly  
22 don't believe that there's a need to adjourn this matter, even  
23 further, at least with regards to U.S. Signs.

24               Just to put it in perspective, Your Honor, the signs  
25 we're talking about with regard to my client are the signs we

1 see every day in abandoned Circuit City stores, the Circuit  
2 City signs. I find it hard to believe that the debtors can say  
3 that these are not goods within the definition of the UCC.

4 I take no position, really, with regard to whether we  
5 apply the predominant purpose test. I believe that there's no  
6 need in our instance to reach that conclusion, the reach the  
7 predominant purpose test. If we look at the UCC it  
8 certainly -- certainly, signs, all of the material that's used  
9 to create signs are goods and are movable at the time of the  
10 contract.

11 The definition of the UCC 2-105, 8.2-105, includes  
12 specially manufactured goods. Certainly, our signs would be  
13 included within this definition. I believe there is no need to  
14 reach a predominant purpose test and we can resolve those  
15 objections today.

16 I would -- we certainly offered a declaration to that  
17 effect. U.S. Signs is a manufacturer and a creator of signs,  
18 and an installer of signs. Certainly, if you'd like to apply  
19 the predominant purpose test, I certainly don't believe that  
20 the debtors could use the materials for anything other than to  
21 create the signs.

22 You know, if they took it back there would be nothing  
23 to do with it. Certainly, under the manufacture -- specially  
24 manufactured goods definition of the UCC 2-201, you know,  
25 specially manufactured goods are not suitable for sale to other

1 -- to others in the ordinary course of a seller's business.

2 Certainly, as we see, those signs are still there.  
3 They're not suitable for use by anyone else, but in either  
4 case, the predominant focus, you know, for this transaction  
5 certainly was to create those signs, and for the sale of those  
6 signs to Circuit City.

7 I don't see how they can object to that. And if  
8 there is some -- you know -- they would like to argue with  
9 that, I certainly believe we can resolve that today.

10 THE COURT: Well, if I understand your argument, that  
11 you were actually selling the signs and that was the business  
12 of which you were doing, if I was to apply the predominant  
13 purpose test to your claim you would say that the predominant  
14 purpose was to sell the actual signage.

15 MR. HUTSON: That's correct.

16 THE COURT: And that the installation of the signs  
17 was --

18 MR. HUTSON: Incidental, Your Honor.

19 THE COURT: -- antecedent to that, and that you would  
20 be able to then, if I adopted that test, recover your entire  
21 claim and you wouldn't have to bifurcate it into that for which  
22 you --

23 MR. HUTSON: For services.

24 THE COURT: -- provided installing services in that  
25 which you were providing the goods.

1 MR. HUTSON: That's exactly -- that's exactly right,  
2 Your Honor.

3 THE COURT: So you would say I should apply the  
4 predominant purpose test?

5 MR. HUTSON: I believe that -- I don't -- I believe  
6 that we don't even need to reach that, particularly with the  
7 use of the specially manufactured good portion of the  
8 definition. But if there is a need I do believe we can  
9 recover, you know, our entire claim based on that, as well.

10 Certainly, I don't see how the debtors can enter into  
11 a transaction for -- to purchase a sign, essentially, and not,  
12 you know, purchase the materials used to create that specific  
13 sign, as well as the installation services for the specific  
14 sign, and you know, keeping in mind, the type of signs that  
15 we're talking about here.

16 So with that, Your Honor, I ask that we -- you  
17 know -- if the Court's going to adopt the UCC definition, I  
18 certainly don't object to that, but I certainly would like to  
19 resolve that definition, at least with regard to U.S. Signs.

20 THE COURT: All right. Thank you. Does any other  
21 party in the courtroom wish to be heard on this matter? All  
22 right. I'm going to turn to the phone. Does any party on the  
23 phone wish to be heard on this matter? All right, Mr. Galardi.

24 MR. GALARDI: Okay. I'm going to work backwards,  
25 Your Honor, just to show how critical -- actually, I'm going to

1 work from the statute first, and then I'll -- I'll take up each  
2 of the responses.

3 First, Your Honor, the first question is whether  
4 reclamation has anything to do with this at all. And I state  
5 with the reclamation statute, which is 546. What 546 says in  
6 the very last sentence, "If the seller of goods," the same  
7 word, "goods," "fails to provide notice in a manner described  
8 in one," that is, to perfect its reclamation claim, "the seller  
9 still may assert the rights contained in section 503(b)(9)."

10 To me, I don't understand how the work could be any  
11 different than 546(c), because it's -- it's basically saying,  
12 look, if you can't give the written notice that you were  
13 supposed to give under reclamation, you can now move to  
14 503(b)(9).

15 The word "goods" is used there, and so it is exactly  
16 related to the reclamation statute. So I wanted to start with  
17 that. Your Honor, then going to -- and Your Honor caught it,  
18 and I'm shaking my head -- when you go to 503(b)(9) it's very  
19 simple to say, oh, look at any goods, but that's the value of  
20 any goods.

21 And the real phrase that's the key phrase is, "goods  
22 have been sold." That's a transactional analysis. That's  
23 exactly what the predominant purpose is looking at. That's  
24 exactly what the UCC looks at. It doesn't look just simply at  
25 the words.



1           It says, okay, if you have a doubt about a  
2 transaction involving goods -- no one's disputing -- everybody  
3 here had some movable stuff -- the question is, is that  
4 transaction going to be captured by this phrase, goods have  
5 been sold. That's a transactional analysis. That's why we're  
6 suggesting that you go to the predominant purpose test.

7           Why that test is so important is we can go straight  
8 through now, from bottom up on U.S. Signs, U.S. Signs' claim --  
9 and I have it as objection P -- U.S. signs agreed to  
10 manufacture, supply and install signs. So it's a lot of stuff  
11 that it's doing.

12           And if you look exactly at the invoices, some say,  
13 "face cab sign." Some say, "permit," "engineering," "freight,"  
14 "due diligence." Others say, "installation," "labor,"  
15 "assembly," "sign," "contractor standby," "manufacture and  
16 install." We do have to go to what's the predominant purpose.

17           We're not disputing that they made signs, they put  
18 signs. The whole question is, that's a transaction. We have a  
19 contract with them. Is that contract predominantly to buy the  
20 goods, the signs, or was it to manufacture, install, do due  
21 diligence, assemble them, put the parts on and then  
22 subsequently deliver them.

23           That's exactly the UCC question, the transaction.  
24 What was the predominant purpose of the transaction, the  
25 contract we entered into with U.S. Signs? Let's go back up now

1 to the advertising. I can't remember that client's name, but  
2 yes, there are leaflets, Your Honor, and leaflets, again, did  
3 we hire them to do this kind of advertising or that kind of  
4 advertising.

5 But let's assume they pass the goods objection, Your  
6 Honor. Our procedures, which Your Honor approved, and the  
7 objection itself said we can then make additional arguments.  
8 And I think Your Honor pointed out -- and what we're not here  
9 for but I'm prepared to argue and since I've done it a number  
10 of times is -- did we -- let's assume he passes it.

11 I still think you have to do with advertising. He  
12 may distinguish all the other cases. He may say, my  
13 advertising is not like anybody else's advertising; the  
14 predominant purpose was to get the leaflets, the stuff, the  
15 goods, but then he only passes that test.

16 Your Honor knows another test is coming up: did we  
17 receive those. Did they put them right into the newspaper or  
18 did -- was there actual receipt? The other definition that  
19 I've had many fights over is, what's receipt. If I say go put  
20 it in the third parties' car, I don't have actual possession.

21 We got another UCC issue on the horizon, and our  
22 objections all reserved exactly those issues, one issue at a  
23 time. The advertising is one. Is this advertising a good or  
24 is it predominant purpose? We're not saying blanket, just  
25 because you, advertiser, give advertising materials, you fail

1 the test. We say it raises the issue of the test and now let's  
2 get to it.

3 Merely because he has a piece of paper that say it --  
4 leaflet -- merely because somebody delivered a good, a movable,  
5 is not sufficient to say it's goods within the UCC, for a UCC  
6 transaction. It's not sufficient to say its goods have been  
7 sold in 503(b)(9).

8 Our purpose is, you got to look at the transaction.  
9 You use the definition and you apply the transactional analysis  
10 that the UCC does, and you should use the predominant purpose  
11 test. Finally, I think the parsing of the "any value" language  
12 is absolutely correct that it uses "any value," but it's "any  
13 value of goods," the goods have been sold.

14 You still have to get that second part in, and  
15 indeed, both Judge Shefferly and judge -- I think Judge  
16 Sontchi, as I recall, said, look, we're not looking at the  
17 value of the goods. You've seen some of the arguments here,  
18 right? Clearly, somebody's increased the value of the goods by  
19 doing certain services, but that's not the focused phrase.

20 The focused phrase is, "goods have been sold."  
21 Again, transactional analysis, UCC, it's tagged to 546. It's a  
22 scape -- an escape hatch for people who don't, at least in my  
23 view, narrowly interpreted, if you can't meet the reclamation,  
24 take them back.

25 You have this option to get a claim; we gave you the

1 exception in 502(b)(9) [sic]; now, you got to take the same  
2 thing you could have reclaimed under 546, take your escape  
3 hatch, make the claim; it's got to be the same kind of goods  
4 you could reclaim.

5 And the goods you could reclaim are in a transaction  
6 under the UCC that satisfies, in our view, the predominant  
7 purpose test. I don't know if Your Honor has any other  
8 questions, but that how -- that's how I would respond to the  
9 three objections.

10 THE COURT: All right. The question that I have is  
11 probably the first question I asked you, and that is, what am I  
12 deciding here, so that I know --

13 MR. GALARDI: I think, Your Honor, what we think that  
14 you should be deciding is, one, what is the proper definition  
15 of goods. As Your Honor already alluded, you could go to  
16 Webster's and say, that's the one, versus the UCC. Question  
17 number one is UCC.

18 Your Honor could go further and say the UCC, which  
19 then says we have the predominant purpose test or not, as you  
20 understand it. Your Honor could take it in little, itty-bitty  
21 baby steps, or you can go to the predominant purpose. We are  
22 advocating, so that we can go further, that it is the  
23 predominant purpose test, that by adopting the UCC, the federal  
24 common law, whatever you want to say, should be the predominant  
25 purpose test.

1           That will set the standard by which we will take  
2 evidentiary hearings going forward. We can resolve certain  
3 people. Maybe the leaflet person is a predominant purpose and  
4 we'll deal with the delivery and receipt, but we need to have a  
5 threshold. So it's summary judgment, UCC standard definition.  
6 I don't know if anybody other than the three gentlemen have  
7 agreed to it.

8           And two, by taking that definition -- again, they  
9 like to say "goods," and then you look at this -- I think  
10 taking the definition is taking the predominant purpose test.  
11 I don't think it's a --

12           THE COURT: I understood that.

13           MR. GALARDI: -- it's not a -- it's not a piecemeal,  
14 though they like to do it that way. In my view, is by  
15 accepting it you're accepting the UCC analysis, and we've  
16 advocating the proper UCC analysis is predominant purpose.

17           THE COURT: All right. Thank you.

18           MR. GALARDI: Thank you.

19           THE COURT: Do any of the three parties that have --  
20 wish to reply?

21           MR. PERKINS: Real briefly, Your Honor. Just two  
22 points to respond to what Mr. Galardi just raised. He started  
23 with the reclamation statute and worked backwards, and he said,  
24 there's a part of that reclamation statute that says, if you  
25 fail to give the written notice then you can shift over to

1 503(b) (9) .

2 Yeah, that's true, and -- but that doesn't mean  
3 503(b) (9) is solely for reclamation. It's a backup position  
4 for those who fail to meet the reclamation test. So --

5 THE COURT: Well, it certainly shows that there's a  
6 nexus.

7 MR. PERKINS: There's certainly a nexus, but it  
8 doesn't answer the question that 503(b) (9) is solely a  
9 reclamation issue, and that goods have to be defined as they  
10 would be under reclamation. 503(b) (9) --

11 THE COURT: Do you -- whoa. Whoa -- do you think  
12 that Congress intended a different definition of goods in  
13 section 546 than it did in section 503?

14 MR. PERKINS: I'm just saying that 503(b) (9) is any  
15 goods, not solely reclaimable goods.

16 THE COURT: All right. I see the distinction you're  
17 trying to make.

18 MR. PERKINS: Yeah, that's -- okay. And then -- and  
19 then as to whether goods have been sold -- and that's a  
20 question you asked me earlier -- absolutely, they've been sold  
21 in a mixed context. The price of those goods is part of the  
22 invoice, the labor plus the cost of the goods.

23 They're not free when we install whatever item we're  
24 installing, and so yes, that also meets -- under my scenario,  
25 under my framework, yes, the goods have been sold, because the

1 cost of those goods is included in the overall price. Those  
2 are the only two points I wanted to make.

3 THE COURT: Thank you, Mr. Perkins.

4 MR. PERKINS: Thank you, sir.

5 THE COURT: Does any of the other two wish to be  
6 heard? Mr. Hutson?

7 MR. HUTSON: Yes, Your Honor. I apologize, Your  
8 Honor. I had to run out and feed the meter. So I missed the  
9 response to my --

10 THE COURT: So you don't know what you're responding  
11 to.

12 (Laughter)

13 MR. HUTSON: But I would like to at least --

14 MR. PERKINS: I disagree with it.

15 MR. HUTSON: -- to reaffirm my, you know, initial  
16 position. And I -- again, like the gentleman before me, would  
17 like to say that these -- you know -- if they're services  
18 incident to the goods that are being purchased, you know,  
19 they're not free.

20 The -- certainly, the invoices reflect certain  
21 things, such as permits and fees that have to be -- and costs  
22 associated with that. But the -- you know -- the overall goal  
23 is to develop and manufacture, in my client's case, signs. So  
24 I just urge the Court to take that into consideration.

25 And again, I'd like to state that I believe that we

1 can at least resolve the objection with regard to U.S. Signs  
2 here today.

3 THE COURT: All right. Thank you.

4 MR. REPCZYNSKI: Tom Repczynski, for Graphic  
5 Communications. As the Court considers applying the  
6 predominant purpose test, the Court is going to find itself  
7 seeking out the parties' intent, subjectively or otherwise. If  
8 it's going to be fact specific and fact intensive, that's what  
9 the Court is going to be forced into doing.

10 In a situation like Graphic Communications where the  
11 intent -- without argument -- was to create pamphlets or these  
12 leaflets that go, the question can't then become, was it a  
13 question to -- and I presume the same with signs -- can't be a  
14 question of whether or not you're going to produce them versus  
15 simply -- whether it -- the question can't be whether it's  
16 going to be to provide a service or to have a good.

17 At the end of the day, they wanted a pamphlet. At  
18 the end of the day, they wanted a sign. So to say what their  
19 intent was, I think ultimately it's going to be on the Court to  
20 look at the transaction, not look at what the subjective  
21 testimony's going to be.

22 And for that, I think the Court already has what it  
23 needs. And I note for the Court, the omnibus objection is  
24 before the Court. To say that some sort of testimony about  
25 whether or not they intended merely to create a pamphlet or a



1 sign versus actually have a sign or have a pamphlet at the end  
2 of the day doesn't get the Court anywhere.

3 So I'm not sure the predominant purpose test makes  
4 sense on an -- on an individual, case by case basis; certainly  
5 not here.

6 THE COURT: All right. Thank you. All right. The  
7 Court is -- although I will issue a written opinion on the  
8 matter -- is going to go ahead and rule on the matter so we can  
9 go forward. The Court is going to apply the UCC definition of  
10 the -- found in Article 2 of 2-105.1 of goods, that all things  
11 movable at the time of the identification to the contract of  
12 sale, and I think that's consistent with the ordinary meaning  
13 of movable goods, as found in the Plastech case and in the  
14 Goody's case, and so the Court is going to apply that.

15 And the majority of courts that have looked at the  
16 factor of these mixed type of contracts have applied the  
17 predominant purpose test, as Judge Sontchi, while he didn't  
18 reach that conclusion, certainly pointed out in his opinion.  
19 And the Court is inclined to follow the majority in that  
20 regard, and apply the same -- the same tests to these types of  
21 cases.

22 And I think that that is certainly contemplated in  
23 the language that Congress used, talking about, in 503(b)(9),  
24 in which goods have been sold to the debtor in the ordinary  
25 course of such debtors' business. That's how you figure out

1 whether the goods have been sold to the debtor in the ordinary  
2 course, is by providing that test.

3 And I think that section 503(b)(9) is certainly a  
4 close nexus between it and section 546, and certainly, goods  
5 have to be interpreted the same way. And that's, again,  
6 another reason why I'll apply the predominant purpose test to  
7 construing these claims.

8 And that's all the Court is going to rule. I'm not  
9 ruling on whether or not there was a sale, whether title passed  
10 or any of those kinds of issues. Those are all reserved. I'm  
11 just ruling on the motion for partial summary judgment on those  
12 two issues.

13 And as I said, I will issue a written opinion  
14 consistent with those conclusions. Any questions concerning  
15 the Court's ruling in that regard? All right. Do we have any  
16 other matters we need to take up today?

17 MR. FOLEY: Your Honor, Doug Foley, on behalf of the  
18 debtors, Your Honor. I believe that concludes the items on the  
19 agenda for today, Your Honor. We thank the Court for its time.

20 THE COURT: All right. Very good.

21 MR. REPCZYNSKI: Your Honor, if I may just seek  
22 clarification.

23 THE COURT: Yes.

24 MR. REPCZYNSKI: In light of the Court's ruling --

25 THE COURT: You may.

1 MR. REPCZYNSKI: -- as I understand, that the debtors  
2 put forward any other matters relating or following up with  
3 these particular omnibus objections, the debtor had written  
4 that they intended to carry those over or request that the  
5 Court carry those over to the October 15th date?

6 MR. GALARDI: Correct, Your Honor. None of the  
7 orders or any of the objections are overruled. We're now going  
8 to sort through those and walk through the issues.

9 THE COURT: Right. So all of the objections are  
10 carried over to the 15th.

11 MR. GALARDI: Yes, Your Honor.

12 THE COURT: October 15th.

13 MR. GALARDI: Yes, Your Honor, items number --

14 THE COURT: And the only thing that we've resolved  
15 are those two issues with regard to these claims.

16 MR. GALARDI: Correct. Items number 57, 58 and 59 on  
17 the agenda are adjourned for the balance of any remaining  
18 issues until October 15th, similar with all the other omnibus  
19 objections.

20 THE COURT: All right. Very good.

21 MR. GALARDI: Thank you, Your Honor.

22 THE COURT: That was certainly my understanding. All  
23 right. Thank you very much.

24 ALL COUNSEL: Thank you, Your Honor.

25 THE CLERK: All rise. Court is now adjourned.

1 (Whereupon, at 1:23 p.m., the hearing in the above-  
2 entitled matter was adjourned.)

3 --oOo--

4 CERTIFICATE

5 I, ELIZABETH REID-GRIGSBY, a certified electronic  
6 transcriber, certify that the foregoing is a correct  
7 transcript, to the best of the transcriber's ability, from the  
8 official electronic sound recording of the proceedings in the  
9 above-entitled matter.

10

11 /s/ Elizabeth Reid-Grigsby September 10, 2009

12 Elizabeth Reid-Grigsby

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14 **J&J COURT TRANSCRIBERS, INC.**

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